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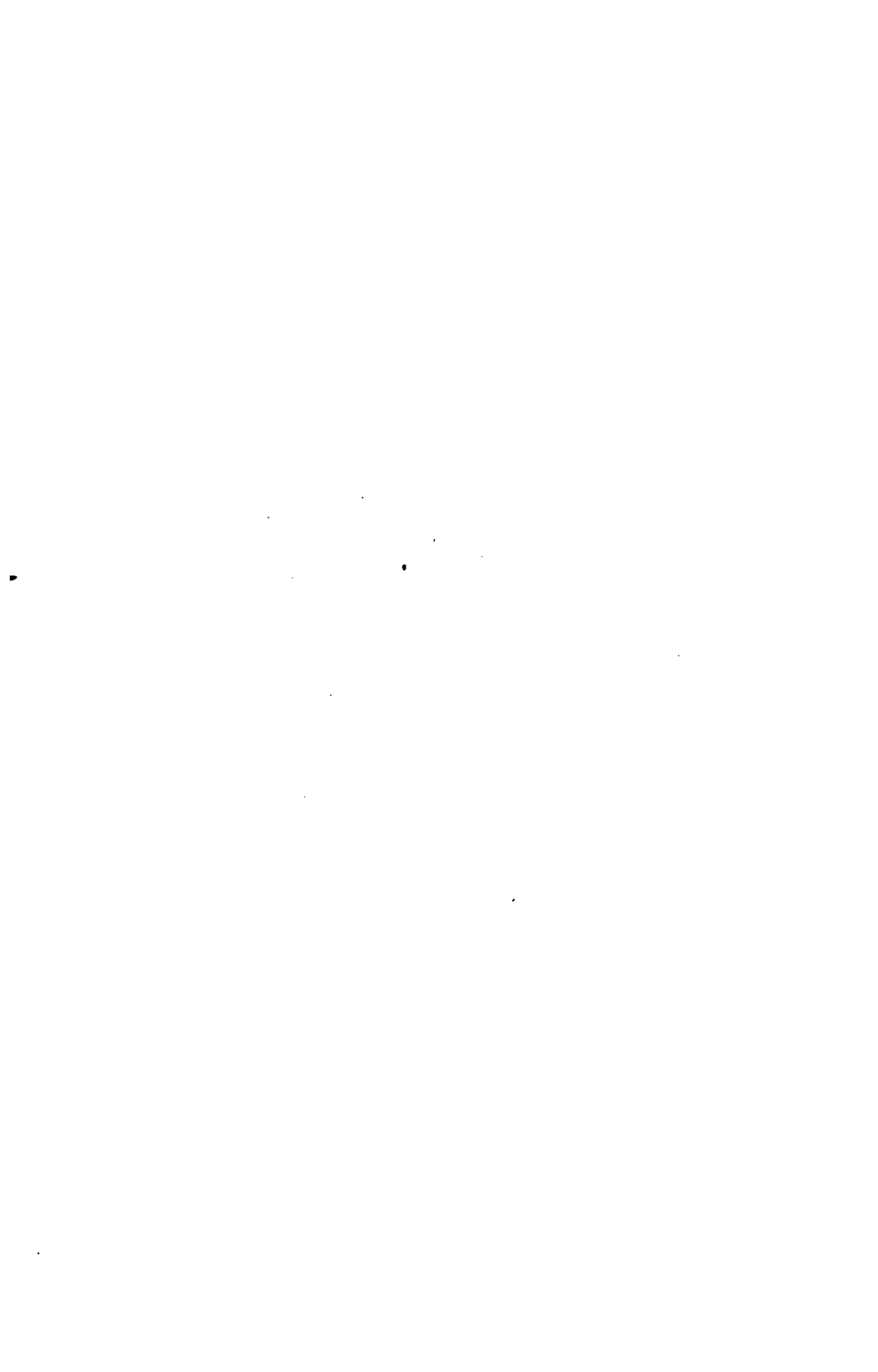
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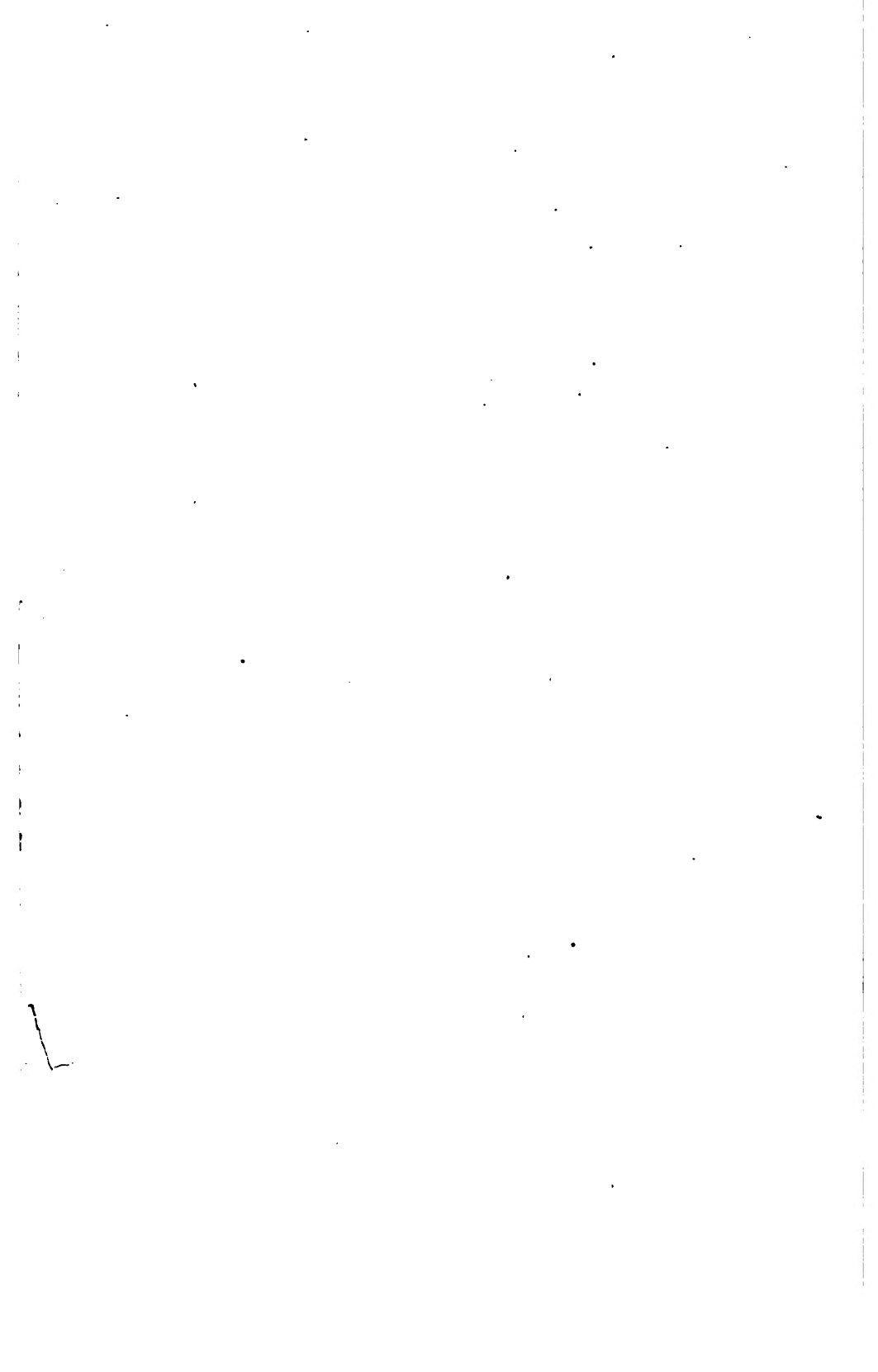


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LOUISIANA
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REPORTS

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OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA.

VOL. 48--FOR THE YEAR 1896.

PART II.

WALTER H. ROGERS, REPORTER.

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Rec. Apr. 9, 1897.

Succession of Aron.

No. 12,043.

SUCCESSION OF LOUISE ARON, DECEASED WIFE OF F. L. NEY.

48 817
52 1408
52 1410

Proceedings taken by heirs of age to foreclose their mortgage against community property which had been adjudicated to the surviving husband and natural tutor are specially provided for in Revised Civil Code, Art. 333, and are somewhat of the character of partition proceedings, and unlike those for the execution of ordinary money judgments or for executory proceedings.

The principle announced in the case of *Kochl vs. Solari*, 47 An. 890, as essential to the effectual removal of the legal mortgage of a minor heir from the property sold in pursuance of such proceedings, is affirmed.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

E. Laizer and Gabriel Fernandez for Plaintiffs, Appellees, cite: C. C., Arts. 271, 321, 333; 16 An. 370; 24 An. 603; 35 An. 329; 47 An. 895; 46 An. 1267; 25 An. 53; 33 An. 305, 1213.

E. J. Meral and Robert Legier for Defendant, Appellant, cite: Arts. 316, 317, 322, C. C.

Submitted on briefs March 27, 1896.

Opinion handed down April 20, 1896.

The opinion of the court was delivered by

WATKINS, J. This is a proceeding by rule to compel Edmond Rixner to accept title to real property situated in New Orleans, and complete an adjudication thereof to him by the civil sheriff in pursuance of an order of court; and from a judgment making the rule absolute and requiring the defendant in rule to comply with the terms of the adjudication by paying the whole price into court, there to remain subject to the order of the court, and not to be withdrawn until the minor's interest therein shall have been perfectly secured and a proper reinvestment made of his share thereof, and thereupon the minor's mortgage against the property shall be canceled and erased, and title to said property passed to him unincumbered, he has prosecuted this appeal.

The facts are substantially as follows, viz.:

Frederick Ney was married to Louise Aron, and she died in the

Succession of Aron.

city of New Orleans on the 1st of September, 1879, leaving with her surviving husband seven minor children as the issue of their marriage. That said surviving husband qualified as natural tutor for said minors and caused an inventory to be taken of the property on hand, all of which was community; and he caused an abstract thereof to be duly inscribed in the book of mortgages to operate as a legal mortgage thereon in favor of the minors. That subsequently said father caused the whole of the property to be adjudicated to him, in pursuance of the provisions of the Code, at the price of five thousand three hundred and one dollars and fifty cents, and gave a special mortgage thereon in lieu of the legal mortgage in favor of the minors, as above specified—said sum being the amount of the appraisement in the inventory, and entitling each heir to the sum of two hundred and six dollars and eighty-nine and two-thirds cents, after deducting the debts of the community.

On the 2d of August, 1893, Frederick L. Ney filed a petition praying to be appointed tutor to his minor brothers and sisters, on the ground that his father, and their natural tutor, had disappeared since the 28th of January, 1882, and had not been heard from since that date, and that his whereabouts was unknown.

On the 10th of October, 1893, Frederick L. Ney, Bertha Josephine Ney, Henry Francis Ney, Walter L. Ney, majors, and John Paul Warren Ney, an emancipated minor over the age of eighteen years, filed a petition before the Civil District Court, representing that the succession of their mother was opened and that their father had qualified as natural tutor; that an inventory of the community property was taken; that after paying all debts their interest amounted to the sum of two hundred and six dollars and eighty-nine and two-thirds cents each, and their rights therein adjudicated to their father, who gave a special mortgage in their favor to secure their interest on property more fully described in that petition—alleging the disappearance of their father and the death of the undertutor; showing that all of the heirs were of age with the exception of Sidney Joseph Ney, still a minor; averring that no settlement was ever made to them by their father of the share coming to them from their mother's succession; that no account was ever rendered to them since their majority, and besides, that their father owned other property in this city more fully described in that petition; they allege also that they are entitled to an

Succession of Aron.

account from their father, who having disappeared and not having been heard of for so many years is an absentee, to whom and for whose proper and legal representation a *curator ad hoc* should be appointed.

On the presentation of that petition, an order was rendered by the District Court appointing a *curator ad hoc*, ordering him after due proceedings to file an account, and that judgment be rendered in favor of plaintiffs and against their father, F. L. Ney, condemning him to pay to plaintiffs the amounts due to them, ordering property described and numbered in the petition to be seized and sold for cash, by Spear & Escoffier, auctioneers, and that from the proceeds of sale the amounts due the plaintiffs be paid to them.

On the 6th of February, 1895, a petition was filed by the plaintiffs asking that a sale be made of the property in controversy, and upon the 24th of April, 1895, a sale was ordered and subsequently made; and same having been adjudicated to the defendant in rule, he declined to accept the title tendered him for the following reasons, viz.:

1. Because the minor, Sidney J. Ney, was not represented in these proceedings by a duly qualified tutor; and, that if said tutor had legally qualified, that the interest of Frederick L. Ney, his father and tutor, in said property was encumbered with a legal mortgage in favor of said minor.

2. Because there is no judgment against said absentee which could justify the sale of his property; and that, even admitting there was such a judgment, his property only could have been sold in execution thereof by means of the writ of *feri facias*.

It is admitted on behalf of the heirs that, in the proceedings above referred to, they appeared as co-mortgagees against Frederick L. Ney, tutor, as an *absentee*, for an account and final settlement by means of a *curator ad hoc*, the minor being brought into court through citation to his under-tutor.

But, while proceeding as mortgage creditors, they mentioned the property as being of a sort that is not susceptible of division in kind, and prayed for the convocation of a family meeting to determine that question as preliminary to a partition thereof by licitation.

Their petition is concluded by a prayer that "after due proceedings had, petitioners have judgment in their favor, ordering the sale of the above property to pay them the amount due and owing to them from the succession of their deceased mother," and in due course of proceedings the following judgment was rendered, to-wit:

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"It is ordered, adjudged and decreed that there be judgment in favor of plaintiffs, * * * recognizing them as creditors of the succession of their mother, Mrs. Louise Aron, each in the sum of two hundred and six dollars and eighty-nine cents, * * * ordering the sale of said property to pay the amount due and coming to them as heirs of this succession."

In the course of the written opinion of our learned brother of the district bench, he says:

"Revised Civil Code, Art. 333, is the basis of this proceeding and has been followed. The family meeting advised the sale, and there is ample from the price bid by defendant for the property to pay the minor, as well as the majors, and by the express terms of that article the legal effect is to relieve the said minor's mortgage from the property sold, and pass the title free of incumbrance to the defendant as purchaser.

* * * * *

"The mother's succession was not in the case—had been closed to all intents and purposes, the tutorship remaining; and, while it was true that petitioner's rights arose out of said succession, yet the proceeding was taken against the absent tutor and the mortgaged property. * * *

"The action is manifestly under said article, and as all necessary formalities were had, for the minor as well as the majors; and as the said absent tutor was represented, and the amount as fixed in his account before his disappearance was found still to be due, all requirements of substance were amply met, etc.

* * * * *

"I think the action of the petitioner was definite and based on the law, and that the judgment was sufficient to base the sale of the property upon. See Succession of Corrigan, 42 An. 65; see City vs. Seixas, 35 An. 41.

"I do not see that the law requires a writ of *fi. fa.* under the special proceedings provided for in R. C. C. 333. The order of court, duly certified to the sheriff, was, I think, a sufficient warrant—a writ for the sale—and that a good sale has been effected, and, for this technical objection, ought not to be defeated."

The foregoing reasons are sound, and the proceedings in exact conformity with the provisions of the Revised Civil Code, Art. 333, and the title to the purchaser is good and valid with respect to the major heirs at least.

Schwabacher vs. Leibbrook.

And with respect to the mortgage of the minors the judge *a quo* further says:

"As above shown, in the proceedings herein taken the family meeting and under-tutor acted and advised for the minor. Under the terms of R. C. C. 838 this is the direction of the law. I think that what has been beneficially done after much cost and trouble, and delay, ought not to be undone; and by applying the rule (announced in) *Koehl vs. Solari*, 47 An. 890, I think that the rights of the minor can be preserved, and that the purchaser can obtain an unincumbered title. If he pays the entire purchase price into the registry of the court the rights of the minor will be fixed and the funds due him held subject to the court's order until such time as the tutor may give bond and secure the rights of said minor."

We think the judge properly appreciated and applied the legal principles announced in *Koehl vs. Solari*, and we affirm their correctness.

Entertaining these views, we regard the title tendered as legal and valid, and that upon due compliance with the opinion and decree of the court *a qua* the minor's legal mortgage will be effectually removed from the property.

Judgment affirmed.

No. 11,927.

J. & M. SCHWABACHER VS. FRANCIS LEIBBROOK.

Where several parties have obtained and recorded judgments against a common debtor, who prior to the obtaining of the judgments made a simulated sale of his property, on the return of the property to the debtor the judicial mortgages will rank according to the date of their recordation.

Where the debtor puts a special mortgage on the property before transferring it, which was null, and this mortgage and the note evidencing the pretended debt is purchased for an insignificant amount from the holder by one of the creditors pursuing the property, he can not assert the rights of an innocent holder against the other creditor who is also pursuing the property and who has attacked the mortgage.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

W. S. Benedict for Plaintiffs, Appellants.

Schwabacher vs. Leibbrook.

Denegre, Blair & Denegre for American National Bank, Defendant in Rule, Appellee.

Argued and submitted April 6, 1896.

Opinion handed down April 20, 1896

The opinion of the court was delivered by

MCENERY, J. On November 3, 1893, the plaintiff obtained a judgment against the defendant for twenty-five hundred dollars, with eight per cent. interest from the 26th December, 1893. This judgment was recorded 4th November, 1893.

The American National Bank obtained judgment against the defendant October 27, 1893, for the sum of three thousand dollars, with eight per cent. interest from 25th September, 1893. This judgment was recorded 31st October, 1893.

The last judgment has priority over the first, and ranks it as a judicial mortgage.

Both of these judgment creditors, about the same time and in the same court, instituted suits to have restored to its possession certain property which had been transferred by the defendant, Leibbrook. Both obtained judgments as prayed for.

On the 23d January, 1895, the judgment creditors, J. & M. Schwabacher, issued an execution on their judgment, seized and sold the property recovered from the defendant in the revocatory action. The net proceeds were two thousand one hundred and ninety-three dollars and fifty-two cents.

J. & M. Schwabacher obtained a rule to cancel certain mortgages on the property, among the number that of the bank.

The defendant, Leibbrook, had executed a special mortgage for one thousand five hundred dollars on the property in favor of one Larkin. In the bank's suit to set aside the fraudulent conveyances, in which the mortgage note was assumed by the vendee, this special mortgage was attacked. The special mortgage and the note were declared null and void. It was in the hands of a third party, and J. & M. Schwabacher purchased the same for two hundred and twenty-five dollars. They had full knowledge of the bank's suit. The note was overdue.

The questions presented are, which judgment creditor is to be paid

Schwabacher vs. Leibbrook.

in preference out of the proceeds of the sale of the property returned to the debtor, and whether J. & M. Schwabacher are entitled to be paid the full face value of the note.

If the contention were among the ordinary creditors seeking the return of property to the common debtor, the rule applied in *Bank vs. Cotton Press Company et al.*, 39 An. 834, would have full force and effect. All creditors have a right to intervene in the first revocatory action, and in separate suits to pursue the same debtor, and to share ratably in the proceeds of the property, provided they assert their rights with apparent and reasonable diligence.

When the property is returned to the debtor it is as though he had never parted with it, and all who have liens or mortgages on it still retain them.

Article 1977, C. C., says "the judgment in this action, if maintained, shall be that the contract be avoided as to its effects on the complaining creditors, and that all the property or money taken from the original debtor's estate, by virtue thereof, or the value of such property to the amount of the debt, be applied to the payment of the plaintiff." It is evident, where there are several plaintiffs, the payment must be made according to the rank of their claims.

The action of the plaintiffs against the defendants who held the property was *en simulation*. The defendants never had any title to the property. The vendor had never parted with the property. It was still his, and the simulated vendee held it only for the vendor. Judgments obtained against the vendor necessarily cover the property in the hands of the simulated vendee, and the first in recordation has a preference, unless the simulated and fraudulent vendee has encumbered it.

During the pendency of the suits against the vendees of Leibbrook they retroceded the property to him. It is alleged as the reason therefor the pendency of said suits and the consideration of the transfers was the payment to them of the amount they had paid to Leibbrook, and placing them in the position they were before the sale. When the property had been returned to Leibbrook, J. & M. Schwabacher made their seizure. It is evident the judicial mortgages against Leibbrook affected the property in the order in which they were registered or recorded.

Whatever value the note had in the hands of a third innocent holder, the firm of J. & M. Schwabacher, who obtained it with full

Mazerat vs. His Wife.

knowledge of its nullity, can not assert the privilege of an innocent holder who was with them pursuing a common debtor to have his property restored to him, and a mortgage affecting the same, and the note accompanying it, declared a nullity. With equal propriety he might have purchased the property sought to be restored to the debtor's estate.

Judgment affirmed.

No. 12,060.

ANTOINE MAZERAT VS. VIRGINIA GODEFROY, HIS WIFE.

A judgment of separation *a mensa et thoro* does not warrant a judgment of divorce *a vinculo*, on the petition of the one against whom it was obtained, if the spouse in whose favor the judgment of separation from bed and board was pronounced pleads in defence of the suit willingness to become reconciled.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

J. D. Kiernan for Plaintiff, Appellant, cited Johnston vs. Johnston, 32 An. 1189; Glandi vs. Peat, 43 An. 161.

Harold W. Newman for Defendant, Appellee.

Submitted on briefs April 6, 1896.
Opinion handed down April 20, 1896.

The opinion of the court was delivered by

BREAU, J. About nine years ago the defendant obtained a judgment of separation *a mensa et thoro* from the plaintiff, her husband.

The custody of the children, issue of their marriage, was given to the wife, in the decree of separation.

In the year 1895, the plaintiff, averring that his wife obtained the judgment of separation, instituted this suit for a divorce *a vinculo*.

In addition to this judgment he assigns a number of causes of complaint, such as, that he has made every reasonable endeavor since the decree of separation to become reconciled to his wife; that he has contributed to the support of their children; that his wife has

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sought and still seeks to alienate from him the affection of their children.

Not one of the causes assigned in his petition can be deemed sufficient for a divorce.

The defendant admits that she was married to plaintiff and that she obtained from him a separation from bed and board.

She denies that she refused to become reconciled to the plaintiff. She says, on the contrary, she desires to become reconciled; that the plaintiff refuses to support their children.

She prays that plaintiff's demand be rejected, and that he be condemned to support and educate their children. The District Court acted upon an exception of no cause of action and dismissed plaintiff's demand.

From the judgment the plaintiff prosecutes this appeal.

The appellee prays that the judgment be affirmed.

The causes of divorce *a vinculo* are recognized by statute. The causes in this case would be enlarged if we were to determine that the defendant is entitled to a divorce. Instead of adopting an interpretation admitting other causes for divorce, we think it proper to adhere closely to the terms of the law.

The causes for divorce are properly subject to strict interpretation. The indissolubility of the marriage is the rule; it is (or should be) regrettingly, that the legislator admits exception to the rule. In support of these statements we refer to a few prominent events.

The Master, himself, taught that man should not sever ties that have received the divine sanction; that the will of the Creator was manifested by the institution of marriage. He admonishes the husband not to cast out the wife of his youth with whom he has long abided, now that she is old, and concluding, the solemn and imposing lesson, which should command the consideration of all men, enjoins:

Quod Deus Conjunxit, Homo Non Separet.

The doctrine of the sacramental nature of marriage received general recognition and was the accepted doctrine at the beginning of the reformation of the fifteenth century. No offence of either of the spouses was a cause for entirely dissolving the marriage covenant. It was confirmed by the Council of Trent. The reformers at the time also planted themselves upon the gospel, but under a different interpretation agreed that divorces should be permitted for grave

causes. The Civil Code of France allowed divorces for enumerated causes. These provisions, permitting divorces, were repealed during the religious reactionary movements of 1816. The law adopted that year expunged divorce from the Civil Code and reenacted the law which permitted separation from bed and board only, and during many years there were no divorces *a vinculo matrimonii* in France.

There is a law permitting divorces at this time.

In England from an early period there was no divorce *a vinculo* sanctioned for causes subsequent; only a separation from bed and board was allowed which did not authorize either of the spouses to marry again.

This practice came from the common law, which held marriage a sacrament and that it could not be dissolved for any cause.

By statute of years comparatively recent, divorces are now allowed in England for the gravest causes, especially enumerated. They are not left to be determined by inference or interpretation.

In the other States of our Union, jurisdiction is conferred upon the courts with the causes named in the statutes.

In a few jurisdictions the causes are as numerous as Thebes had gates, and they are moreover enlarged by the liberal interpretation of the courts. The disorder and distress it has occasioned in certain cases in families are persuasive arguments against latitudinarian interpretation.

In Louisiana, under Codes of 1808 and 1825, separation from bed and board did not dissolve the bond of matrimony, and the separated husband and wife were not permitted to marry again.

Divorce is permitted since, for stated causes. The courts have not sought to enlarge them by interpretation, as will be seen by reference to the case of Johnston vs. Johnston, 32 An. 1139.

The historic features to which we have briefly alluded teach the necessity of conservative interpretation.

Although the interpretation of the doctrine to which we have referred has not always been uniform, all moral theology teaches, without discussion, that the bonds of marriage ought not lightly to be dissolved.

The conclusion reached by us also finds support in the fact that each, the plaintiff and the defendant, alleges an attempt at reconciliation.

State ex rel. Supervisors of Election vs. Judge.

The defendant's offer to become reconciled concludes the plaintiff.

Upon that point we translate from the commentaries of Mr. Laurent: Should the spouse who has obtained a separation from bed and board, after having selected the remedy in conformity with his wishes, and possibly of his creed, be permitted to maintain that condition without any possibility on the part of the defendant of obtaining a divorce on this judgment after the time has elapsed? His views, in answer to the question which he propounds are favorable to a defendant's position in such a case and would support plaintiff's contention here (defendant in the judgment of separation *a vinculo*) were it not that he adds: The one who has obtained the separation from bed and board has no cause of complaint if he be condemned in proceedings for divorce, for he is not constrained, as it depends upon the plaintiff in suit for separation from bed and board to reinstate the marital relations, and it is only on the refusal of such a plaintiff that divorce is pronounced. Vol. 3, Sec. 108.

Here the defendant, who was the plaintiff, as we have stated, in the suit for separation from bed and board, not only has not refused reconciliation, but especially avers her willingness to become reconciled. This offer precludes the husband from obtaining a judgment of divorce on the ground alleged, that no reconciliation had taken place.

It is evident that plaintiff can not recover a judgment.

It is therefore ordered, adjudged and decreed that the judgment appealed from is affirmed.

No. 12,147.

48 827
120 625

STATE OF LOUISIANA EX REL. SUPERVISORS OF ELECTION OF PLAQUEMINES PARISH VS. A. E. LIVAUDAIS, JUDGE, JAMES WILKINSON RESPONDENT.

While the courts can have no right to pronounce an abstract opinion upon questions entirely political, to compel officers to perform specific duties imposed upon them by law, whether relating to elections or to any other duty devolving upon them, writ of *mandamus* issues to compel a proper execution of a purely ministerial duty.

ON APPLICATION for Writs of Prohibition and *Certiorari*.

E. Howard McCaleb, for Relators.

State ex rel. Supervisors of Election vs. Judge.

James Wilkinson, for Respondents.

Submitted on briefs April 15, 1896.

Opinion handed down April 20, 1896.

The opinion of the court was delivered by

BREAUX, J. The relators complain of a judgment rendered (at the instance of one of the candidates for a judicial position) by the respondent judge, and pray that the writs of *certiorari* and prohibition they invoke be made absolute.

The judgment complained of made the writ of *mandamus* peremptory.

It is true that mere abstract political questions are not within the jurisdiction of the courts. That the litigant has not the power before the court of using or directing the force residing in the body politic in order that he may stand in judgment.

Thus, in *State of Georgia vs. Stanton*, 6 Wallace, 50, 78, the Supreme Court of the United States held that it would not restrain the defendants, who represented the executive department of the government, from carrying into execution certain acts of Congress, as the questions presented were entirely political, and the plaintiffs had no personal right or interest in arresting the governmental action proposed.

In several other cases cited by relator here the courts have declined to assume jurisdiction of questions entirely political in their character. These cases do not apply to the case under discussion.

The case here presented is one in which, it is alleged, a private right is involved, and the testimony, in some respects at least, goes far toward sustaining the allegation.

With the merits of the controversy we are not concerned in these proceedings. It suffices for the maintenance of that writ that the court has jurisdiction and the proceedings are in due form.

As relates to jurisdiction, although it has been held by this court that in the absence of special statutory authorization courts are without jurisdiction to entertain contested election cases, the rule has never been extended so as to entirely exempt officers from all judicial control and relieve them from all responsibility however much they may violate the statutes adopted for holding elections.

State ex rel. Supervisors of Election vs. Judge.

Violations of the statutes may precede the elections requiring judicial action for their redress.

The question is not one of first impression in this court.

This court said in *State ex rel. Patton, Register, vs. Judge*, 40 An. 393-398, in passing upon the question of judicial cognizance of cases touching the conduct of elections: "No authority is or can be cited exempting public officers charged by law with specific ministerial duties in election matters from the same judicial control which is exercised over all other officers of the State with reference to similar duties."

The question at this time is more peculiarly one of prematurity than jurisdiction.

In a contested election the questions here involved would be in the court's jurisdiction if they are questions of violations of the statute and the violations prejudiced the rights of the complainant.

It follows as a conclusion that there are some violations of the statutes which may be inquired into and passed upon, even prior to the election, when needful to protect rights actually infringed or incontestibly about to be infringed. As far as the right of the complainant is personal, the court has jurisdiction.

In regard to the value of the right involved, it embraces not only the right to hold office, if elected, but the right of franchise; the right to cast one's vote in the manner and under the security intended by the statute. A great English judge has said: "A right that a man has to vote at the election of a member of parliament to represent him, and there to concur in the making of laws which are to protect him in his liberty and property, is of the highest importance."

The right is not always appreciated and exercised with that importance in view. This does not detract from its value and importance.

It is ordered and decreed that the preliminary order be dissolved and the writ refused at relator's costs.

DISSENTING OPINIONS.

WATKINS, J. Upon mature deliberation I am satisfied that the controversy in the respondent's court of which relators complain were and are purely political, and of which he had no jurisdiction, and our writ of prohibition ought therefore to be made perpetual. *State ex rel. Woodruff vs. President, etc.*, 41 An. 846; *State*

State ex rel. Supervisors of Election vs. Judge.

vs. Judge, 13 An. 89; State *ex rel.* Bonner vs. Lynch, 25 An. 267; State *ex rel.* Moncure vs. Dubuclet, 28 An. 698; R. S., Secs. 1417 to 1485, as amended by Act 106 of 1892.

The duties of police jurors with regard to the selection and establishment of polling places and the like are vested by the election law in the discretion of those bodies as political functionaries.

Sections 9 and 10 of Act 181 of 1894; State *ex rel.* Blackman vs. Strong, Secretary of State, 32 An. 178.

McENERY, J. The plaintiff is a candidate for a political office. To confer jurisdiction upon the lower court he made a jurisdictional averment as to the value of the office. He asserts no title to the office. He is only offering himself for the office. His title to the same will depend upon the result of the election. When this is promulgated, if he has cause to complain, it will be time for him to urge his claim to the office if he finds reasons therefor. No right of plaintiff is alleged to be infringed. I find nothing upon which to predicate an averment to give jurisdiction. A possible contingency, which may or may not happen, gives him no such right to the office that he can make a jurisdictional averment as to its value.

I think it is erroneous to say that the right that each citizen has to see that the election is properly conducted is of a value inappreciable in money, and by inference it exceeds the lower limit of the jurisdiction of the court below. Jurisdiction is given by the law. 2 Barb. 828; 3 Texas, 157.

The jurisdiction of the District Court is fixed by law. After the jurisdiction of the court has been fixed by law, the judge is without authority to assume that a right to which no value can be fixed has an imaginary one.

The conduct of the election is by law devolved upon the executive officers. The courts can not interfere in the manner in which the election is to be conducted without trenching upon the duties of the political department of the government, which is forbidden by the Constitution.

The interpretation of the election law in the manner of conducting the election devolves exclusively upon the political department of the government. In a proper case brought before it, the courts may put the election machinery in motion; that is, compel the election officers to perform a duty imposed upon them by law, but they

Boikens vs. Railroad Co.

can not restrain the election officers from the performance of a duty as they construe it. If the duties imposed upon the election officers are employed to perpetrate a fraud in a contest for office, these facts become matters of proper inquiry in determining whether the complainant was elected to the office by virtue of the election.

In my opinion there was an usurpation of jurisdiction by the District Court, and the writ of prohibition should be made perpetual.

No. 11,862.

48 831
111 896

BOIKENS VS. NEW ORLEANS & CARROLLTON R. R. Co.

Ordinarily, passengers on street cars are expected to alight with some haste.

When, however, a person is infirm, or clumsy, or incumbered with packages or other hindrances, more prudence is required than ordinarily.

The questions were whether the passenger was on the steps alighting from the car and thrown to the ground by too hastily putting the car in motion, or whether the passenger was, after having alighted, rushing back to get a forgotten basket. In the former she has right to damages; in the latter case, she would not have.

The testimony is conflicting. The jury and the District Judge, who saw and heard the witnesses, decided that the weight of the testimony was with plaintiff, and that the passenger was alighting from the car at the time of the accident. The court finds no reason to disturb the verdict.

The damages fixed are not too large, and therefore the court will not reduce the amount.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Samuel Jamison and Gurley & Mellen for Appellee.

John M. Bonner and Henry P. Dart for Appellant.

Argued and submitted February 25, 1896.

Opinion handed down March 9, 1896.

Rehearing refused April 20, 1896.

The opinion of the court was delivered by

BREAUX, J. This was an action to recover damages for injuries alleged to have been sustained through defendant's negligence. Plaintiff avers: That, on the morning of June 5, 1895, she boarded car No. 34, belonging to defendant company, paid her fare, and, be-

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fore the arrival of the car at the corner of St. Charles avenue and Delachaise street, notified the conductor that she wished to get out at the corner. That the car was stopped, and she was in the act of getting off. That she had two baskets, one small and the other large. That she placed the small basket in a convenient position on the platform, took the large basket on her left arm, took hold of the rail of the car with her right hand and stepped backward, but before she was off the car, endeavoring to place one foot on the ground, the car was put in motion. She was thrown off, and her right hand injured. The defendant filed an exception, averring that plaintiff entered into a compromise, wherein she acknowledged that the sum paid to her was in full payment of all claims. The receipt referred to states, as the declaration of the plaintiff, that the accident was due to her carelessness entirely, not being accustomed to the city cars, and that the defendant was not at fault. The following is a copy:

“NEW ORLEANS, July 14, 1894.

“Received, New Orleans, July 14, 1894, from the New Orleans & Carrollton Railroad Company a donation of ten dollars in full payment of all claims I have or may have against the said New Orleans & Carrollton Railroad Company for an accident which happened to me on Delachaise and St. Charles avenue. It was no fault of the company or its agents, and was due to my carelessness entirely, not being accustomed to the city cars. This shall be my receipt in full.

her

“MINERVA X BOIKENS.
mark.

his

“MARK X THORNTON,
mark.

“Witnesses:

“D. C. DAUNOY,

“J. P. GLYNN.”

This exception was referred to the merits, and was, in effect overruled by the verdict and judgment. The defendant answered, reserving the benefit of the exception, pleading the general denial, and specially averring that the compromise should have been attacked in a separate action, and not referred to the merits. Prior to the filing of the answer, plaintiff filed, with leave of the court, a supplemental and amended petition, setting forth that, at the time she

filed her original petition, she did not know of the existence of the alleged compromise, for the reason that it was procured by fraud and misrepresentation of the defendant and its employees, who thereby imposed upon her ignorance. The plaintiff admits that she signed the receipt and received ten dollars, but affirms that it sets forth a very different contract from the one the defendant says it is. The agents of the defendant, who were present at the time the receipt was signed, testify that everything was explained to her before she signed. But this receipt was pleaded, by way of exception, against plaintiff, as an admission of fault and carelessness, and as an estoppel of further claim.

If the facts attending the fall and consequent injury are as alleged, the plaintiff, an ignorant old woman, is not concluded by this receipt. She was, at the time, in a suffering condition from the effects of the accident, and was presumably inclined to accept small amounts, believing that they would enable her to obtain relief. We can not attach conclusive importance, under the circumstances, to the mark affixed to the receipt by this ignorant old woman. It was a donation, or at any rate, the word "donation" is written in the instrument signed. In this instrument she declares that she was not accustomed to the city cars, while, in reality, there were employees present who were aware of the contrary; that she was a frequent passenger, "a patron of the road since many years." Such a receipt, signed by any one of ordinary intelligence, would be binding and conclusive. It does not seem, as against this plaintiff, for reasons already stated, to be entitled to the weight that it would otherwise have. If the money was received under the impression that it was a gratuity, although, in paying it, it was the intention of the defendant to get the signature of the plaintiff, under the circumstances here the defendant can not obtain any advantage.

Before taking up and discussing the law points involved, we made a brief summary of the testimony, viz.: The plaintiff, as a witness, said: That the car was stopped and that she attempted to alight. She had two baskets, one large and the other small. She took up the first on her right arm, having previously placed the small basket in a convenient position on the platform, and stepped backward to get off. She took the rail of the car with her right hand. Her left foot was on the ground, and the other foot on the step of the car, when the car moved off, without giving her sufficient time to alight,

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and caused her to slip. She fell on the ground, after having been dragged a short distance. Her right hand and shoulder were badly sprained. Three witnesses have testified in corroboration of this testimony. They are not careful in their statements, and their evidence is at times quite conflicting. They all agree in testifying that the plaintiff had not left the car when the accident happened. The first witness called for the defendant, testifies that she had already left the car, and that she stepped back and made a grasp at the small basket, on the front of the rear fender of the platform, and was caught on the car and dragged. This witness further says, in answer to questions, that he does not remember putting his head out of the window. "Q. Have you ever tried, in one of those electric cars, to see whether you could see the step? A. Never have experimented with them. Q. Don't you know it would be impossible to see the step from where you were sitting? A. From where I was sitting? Q. Yes; don't you think it would be absolutely impossible? A. Not unless I put my head out of the window." The testimony of another witness for the defendant is substantially similar.

The plaintiff and her witnesses are, in giving their testimony, positive that she had not left the car. The witnesses for the defendant testify that she had already alighted, and that it was in her rushing back to get her basket that the accident happened. During the few moments of an accident, witnesses will seldom agree in regard to the facts, particularly if some one gets hurt. Generally each has his particular impressions, and relates the causes of the accident differently. Here it was the matter of an instant. The most conscientious and alert witness may have thought that she was, at the time, attempting to return to the car, when, in reality, she was holding on, in her fright, to escape from injury. The jury and the judge, who saw and heard the witnesses, and observed the manner of their giving their testimony, have concluded that the plaintiff was a passenger. We are reluctant to disturb their verdict. If she was on the car, as we infer she was, at the time, it only remains for us to apply the law in such cases. Any person actually on the car or in act of getting off, is a passenger, and the company is charged with the duty of looking to his safety; and this involves the necessity on the part of the conductor of allowing the passenger time to get off the car. We are constrained to hold that a passenger who is violently thrown to the ground and injured by a car, too hastily put in motion,

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is entitled to damages. With reference to the *quantum* of damages: The injury received was violent, and caused severe pain. She was under medical treatment a number of months. Her attending physician testifies that the ligaments of the wrist joint—that is, the tendons which bind the joints—were sprained and removed from their place. The thumb tendon was also inflamed, and the functions of the fingers very much abbreviated. The pain extended to the elbow and armpit. At first he practised the passive motion; that is, gently moving the hand. Afterward he used the Faradic battery, and afterward applied a plaster cast, which she kept on during four weeks. She had not entirely recovered at the time the suit was tried. We think the amount of the verdict is reasonable, and should be affirmed.

The verdict and judgment of the court are therefore affirmed.

No. 12,126.

MORRIS LEWIS vs. H. W. BRIETLING.

The amount involved in this case is not within the jurisdiction of the Supreme Court.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

The opinion of the court was delivered by NICHOLLS, C. J.

No. 12,072.

MRS. ELIZABETH R. CARROLL vs. CHARLES V. CARROLL.

The rejection by a court of a wife's claim for alimony is unquestionably irreparable; if erroneous it could not be repaired unless through appeal.

In this State applications for alimony rest upon the articles of the Civil Code under control of judicial discretion of the court. The law in this State relatively to alimony does not materially differ from that of other States.

When, at the time the wife's claim for alimony at one hundred dollars per month had been disposed of by the District Court, it amounted to a sum in excess of that required to give the Supreme Court jurisdiction, the appeal from a judgment fixing amount of alimony will not be dismissed.

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Article 148, C. C., which provides that "the husband can not be compelled to pay * * * unless the wife proves that she has constantly resided in the house appointed by the judge," must be read (subject to exceptional cases) in connection with Article 147, which declares that the wife shall prove her residence "as often as she may be required to do so." The law designs that the wife shall be subjected to the supervision of the court, but on this matter the court must be left some discretion and control.

If a husband object to the order fixing the domicile of the wife, he should proceed to have such order set aside directly, not collaterally.

The order of court which assigns a domicile to the wife pending her action for a separation should not be used to her disadvantage.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

W. S. Benedict for Plaintiff, Appellant.

Moïse & Cahn for Defendant, Appellee.

Submitted on briefs April 7, 1896.

Opinion handed down April 20, 1896.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

NICHOLLS, C. J. Appellee has moved to dismiss the appeal in this case on the ground that it appears on the face of the papers and record that the matters and things propounded in the pleadings and issues determined are not appealable to this court; that the alimony *pendente lite* demanded by a married woman in an action for separation from bed and board is not in its nature within the jurisdiction of this court. That the decree below is interlocutory and for less than two thousand dollars, and does not cause irreparable injury.

In April, 1874, the present plaintiff, the wife of the defendant, instituted a suit in the District Court for the parish of Orleans, in which she averred that her husband had abandoned the matrimonial domicile and had refused, and persistently refused, to support her, without justification or excuse. That he had ample means and expended the same for his own gratification and pleasure, while she was in necessitous circumstances and forced to rely upon friends for support and maintenance. The prayer of her petition was that de-

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defendant receive her at his domicile and furnish her, as his lawful wife, with the necessaries of life, according to his position and means, or in the alternative that she have judgment condemning him to give her aid and support in the sum of one hundred dollars per month. Defendant pleaded the general issue. Immediately after this, plaintiff, suggesting that considerable time would necessarily elapse before a trial could be had on the merits, prayed for a rule on the defendant to show cause why "a provisional alimony of one hundred dollars per month should not be allowed her, commencing from the filing of the suit and payable in advance. To this rule defendant excepted on the ground that the petition showed no ground for alimony, as the suit was not one for separation or divorce, and that alimony was only allowable in suits for separation or divorce *pendente lite*. The exception was overruled, and on trial thereof the rule was made absolute and defendant was adjudged to pay to the plaintiff alimony at the rate of one hundred dollars per month from the filing of the suit until the final determination thereof. The decree was signed on June 1, 1874, the original suit remaining *in statu quo* until January 25, 1884, when it was sought to be revived by judicial proceedings. After judgment of revival had been rendered by default, defendant, appearing, maintained that plaintiff was without right to stand in judgment in either the original suit or that for revival; that the original judgment and the judgment of revival were nullities and should be so decreed and set aside. The District Court sustained defendant's contention and rendered judgment annulling the judgment of revival, and also the interlocutory decree of June 1, 1874, awarding alimony to the plaintiff *pendente lite* and rejecting plaintiff's demands. She appealed, and this court affirmed the judgment on the ground that a demand by a wife for alimony is an incident of a suit for separation from bed and board or divorce. That it was accessory to it and inseparable from it. That an independent suit for alimony disconnected with and not growing out of a suit for separation from bed and board or divorce was an anomaly. 42 An. 1071.

On November 25, 1891, plaintiff brought a second suit against her husband. In her petition she recited the facts connected with the former litigation and its results and reiterated the allegations contained in her petition in the first suit. She averred that she was entitled to a judgment of separation from bed and board to date from

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the 22d day of April, 1874. In the course of her petition she averred that she was entitled [by reason of the abandonment of herself by her husband and by virtue and reason of the former proceedings and the proceedings she was then inaugurating] from said period of abandonment until a final divorce be granted to an alimony from her said husband in the sum of one hundred dollars per month. That her father, who had contributed the means for her support, was now dead, and that she had been sustained in life and was still being sustained by the aid and assistance of her mother at Church Hill in Jefferson County, Miss., which was her present residence and which she desired assigned to her as such; she not having the means or friends in the State of Louisiana to locate therein and establish her domicile therein. Her prayer was that her husband be cited, and after due proceedings had by citation issued and of summons under the law (there being no matrimonial domicile by reason of his own act), that he be ordered to declare a matrimonial domicile, to live with her and support her in due accord with law, and otherwise to comply with his contract and the law. That in the event of his refusal to do so, there be judgment of separation from bed and board with a view of final divorce between them. That alimony be granted to her in the sum of one hundred dollars per month, to date from and after the abandonment set forth in the petition, viz.: the 22d of April, 1874, and continuing to the date of final divorce when granted in her suit then brought. That her domicile be assigned to her by the court at Church Hill, Jefferson county, State of Mississippi.

Upon considering this petition the District Judge ordered that the residence of plaintiff's mother, at Church Hill, Jefferson county, Mississippi, be assigned to her as her domicile pending the proceedings.

The defendant, among other causes, excepted: That plaintiff's petition disclosed no cause of action. That the court was without jurisdiction when plaintiff, for over twenty years, had been a non-resident of the State. That the court was without right, power or authority to fix the domicile of plaintiff outside of the State and the jurisdiction of the court—the intent of the law being that both the court and plaintiff should have plaintiff under their eye.

That the plaintiff had no right to have a domicile or residence outside of the State and yet demand alimony, as it was impossible for

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defendant to know anything of her. That for the court to take jurisdiction of the case in its condition as detailed by the pleadings would be against both the letter and spirit of the law, as the object of permitting a separation from bed and board was to enable the parties to be reconciled within a year before final decree for divorce, if possible. The court sustained defendant's exception of no cause of action, in so far as plaintiff demanded alimony for a period previous to the institution of the existing suit. The other exceptions were overruled. Defendant then answered.

In reference to the particular question of alimony he averred that at the time plaintiff alleged she was in want she was living under the roof of one of the relatives of defendant, and was cared for as well as she could be, and during that time he was absent from the State seeking work. That he was poor, with limited means, and never had been a man of much means—that at the moment of filing his answer she had more means and lived in greater luxury than he did. That the plaintiff had no need of alimony and was well-to-do, and that her demand was made with a view to enable her to live in the luxury and comfort which comported with the wife of a wealthy man, when in truth she was the wife of a very poor man. That he was willing to have the plaintiff return to him if she were willing to return and live as became his means, which was less than one hundred dollars per month. That he stood ready to support and care for the plaintiff, and had always been willing to do so; but that she demanded more than he could give, and that if she was willing to accept what the defendant could give, he was willing to give to the full limit of his means, and whenever the plaintiff would come he would provide for and receive her. He prayed that plaintiff's demand be rejected.

In February, 1895, plaintiff suggesting that the cause was fixed for trial, and that she was present in New Orleans to attend the same, the court assigned as her residence the Christian Woman's Exchange.

On the 2d April, 1895, the District Court reciting that the cause had been tried upon its merits and submitted for adjudication upon due consideration of the law and the evidence, considering for reasons orally assigned that the plaintiff had failed to make the proof of abandonment required by Art. 145, C. C., and that there was therefore nothing on which to base the ancillary judgment of alimony prayed for, ordered, adjudged and decreed that plaintiff's demand

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be rejected as of non-suit. Plaintiff appealed from this judgment. This court, in May, 1895, reversed the judgment and remanded the cause for further proceedings, either upon plaintiff's demand for alimony *pendente lite* or upon the merits of the principal demand for a separation from bed and board as might be deemed preferable. The *syllabus* of the case is that "in case a trial is had and a judgment rendered in a suit for divorce, with which is also coupled a rule for alimony, the record leaves it in doubt whether the issue disposed of was the question of alimony or the merits, the purposes of justice will be best subserved by a reversal of the judgment and the remanding of the cause for a new trial." 47 An. 1135.

On June 4, 1895, counsel of plaintiff suggesting the decree of the Supreme Court remanding the cause—the petition on file and the evidence before taken, and that plaintiff had no income for her maintenance during her suit for separation—that she resided at the domicile assigned her by the court—that her husband could well afford her one hundred dollars per month and was abundantly able so to do, obtained a rule upon defendant to show cause why alimony should not be paid her at one hundred dollars per month as prayed for in her petition on file, during her suit for a separation, and why execution should not issue therefor. This rule coming on for trial on June 21, 1895, the court ordered it to be dismissed for want of jurisdiction. On the 25th of June, 1895, plaintiff, averring that her health was impaired, prayed that during the recess of the court she have assigned as her residence that of her mother at Church Hill, Jefferson county, Mississippi, or at her brother's in Baton Rouge. The court declined this application, declaring it had no power to assign to plaintiff a residence outside of the parish of Orleans.

The action of the District Court dismissing plaintiff's rule for alimony for want of jurisdiction was evidently based upon the fact of the pendency of the appeal in the Supreme Court from the prior judgment in the case, for on June 24 the rule was renewed upon counsel for plaintiff suggesting that the decree of the Supreme Court in the matter of that appeal had become final. In July, 1895, Judge King, acting in the place of Judge Théard, absent (upon submission to him of a certificate of a physician declaring a change of climate and location was necessary), signed an order authorizing the plaintiff to absent herself from her assigned domicile until the reopening of the court in November; she holding herself, at all

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times, through her counsel, subject to any orders the court might make.

On the 20th of January, 1896, the District Court rendered judgment upon the rule for alimony, stating that, for reasons orally assigned, the court was of the opinion that under the law and the evidence plaintiff was entitled to alimony to the extent it was then granted. It ordered and decreed that the rule for alimony be made absolute in so far only as to order defendant to pay to his wife, the plaintiff alimony *pendente lite* at the rate of thirty-five dollars per month from December 23, 1895. It further ordered and decreed that the rule as to the claim for alimony prior to the institution of the existing claim be discharged, and that, in other respects, it be dismissed as in the case of non-suit. From this judgment plaintiff appealed and it is this appeal which defendant has moved to dismiss on the grounds stated.

In plaintiff's second suit, filed November 25, 1891, she prayed for alimony to date from the 22d day of April, 1874. On exception, that portion of this demand as claimed alimony prior to the suit then existing was dismissed. This ruling left the demand for alimony as from the date of judicial demand (December 4, 1891) in the second suit, still standing. The matter was not disposed of until January 20, 1896. At that time her claim for alimony amounted to a sum in excess of that required to give this court jurisdiction on appeal from a judgment adverse to the claimant. The wife had the right to have her claim passed upon as presented. If held good it would date back from the judicial demand in the suit.

Article 148 of the Civil Code declares that "if the wife has not a sufficient income for her maintenance *during the suit for separation*, the judge shall allow her a sum proportioned to the means of the husband." A delay in bringing the rule to trial does not work a forfeiture of the allowance. The husband could force the trial if he chose. Our law relatively to alimony *pendente lite* does not materially differ from that of other States.

Bishop on Marriages and Divorce, Vol. 2, Sec. 424, says: "Alimony *pendente lite* is commonly made by the terms of the order itself to commence from the return of the citation. This is the true rule, for till then the wife may be considered as able to obtain subsistence on the credit of her husband. But it may be directed to begin earlier or later * * * Sec. 425." "The temporary ali-

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mony may be awarded at the final decree, to commence with the bringing of the suit."

In American and English Encyclopedia of Law, *verbo* Alimony, p. 477, under the heading "When alimony *pendente lite* ceases," it is stated: "Alimony *pendente lite* may begin as soon as the husband is in court, and if the court does not annul the decree it continues as long as the suit is pending, but ceases when the suit is dismissed." A number of authorities are cited in a foot note under this heading to the effect that such alimony may be made to take effect from the beginning of the suit. In *Swearingen vs. Swearingen*, 19 Ga. 267, Lumpkin, judge, said: "Was it error in the court to make the allowance of alimony to relate back to the commencement of the suit. We see no objection to this. It is usual and proper in such cases."

As the wife had at the trial of the rule the legal right to present her demand for alimony as one dating from judicial demand, we think so far as the question of appeal is dependent upon the amount in controversy the motion for dismissal herein is not well taken.

The next objection urged is that the judgment is interlocutory in its character and does not work irreparable injury. From certain standpoints the judgment is interlocutory. It may, after having been granted, be modified or annulled by changing conditions by summary motion or petition in the original cause, not by a new proceeding (*Bishop on Marriage and Divorce*, Sec. 433), or may, after having been refused, be renewed and allowed, but none the less it may, under some circumstances, become *res judicata* and preclude the parties from going behind the decree in reference to it unless appealed from. Thus we find in *Frazier-Herman*, under Art. 269 of the Code Napoleon, the following decision noted:

"Jugé que si le conjoint demandeur n'a point appelé du jugement provisoire qui a déterminé le chiffre de la provision alimentaire que doit lui payer l'autre époux pendant la durée du procès il ne peut ensuite sur l'appel du jugement définitif demander qu'une allocution plus considérable lui soit accordée. Douai, 19 Novembre, 1846 (S. 48, 2, 522, P. 48, 2490). See on this point *Imhof vs. Imhof*, 45 An. 717.

An appeal from the main judgment would not carry up this particular order rendered prior thereto on a special rule. We think that the rejection by a court of a wife's claim for alimony is unquestionably irreparable. We do not know how, if erroneous, it could be repaired, unless through appeal.

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It is urged that the order as to alimony rests in the discretion of the court below. That is true. It does so to a very great extent; we so declared in the case cited (45 An. 717), and we would not lightly disturb a judge's ruling on that subject, but this doctrine must not be carried to the extent of cutting off or barring absolutely the right of appeal. Bishop, Vol. 2, Sec. 406, says: "The *ad interim* alimony and money for the suit's expenses are given not as of strict right in the wife, but of sound discretion in the court. Yet the discretion is judicial, not arbitrary. When exercised fairly and without abuse by the trial court it will not ordinarily be interfered with on appeal. Yet it will be where substantial rights have been impaired—a doctrine the precise limits of which in our States are not quite uniform. What is a judicial discretion we said in another connection (Vol. 1, Sec. 830), therefore, when the application is brought within the principles ordinarily recognized as entitling the wife to an allowance it was given pretty much as of course and usually without inquiry into the merits of the cause." The views expressed by this court in the case of *Imhoff vs. Imhoff* were made not upon a motion to dismiss, but after submission of the case and investigation.

In this State an application of that kind rests upon sections of the Civil Code and are controlled by the judicial discretion of the court. We are of the opinion that the appeal taken in this case should not be dismissed.

The appeal is maintained.

ON THE MERITS.

Appellee has asked no amendment of the judgment. It can not therefore be altered to the prejudice of the appellant. We are to inquire whether there be anything to the prejudice of the appellant in the judgment. We are inclined to believe that in fixing the date from which it accorded alimony as of the day of the trial of the rule, the court was following what it conceived to be an inflexible rule of action as having been announced by this court in *Suberville vs. Adams*, 47 An. 68, to the effect that "in all cases where a wife who has brought a suit for separation from bed and board from her husband demands alimony *pendente lite*, it is part of her case to establish affirmatively that she has during the whole period for which alimony is asked remained constantly at the domicile assigned her,

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and this, though no question had been raised by the husband on that subject." The pleadings and facts in the Suberville case presented the question to us from an exceptional standpoint, and it was from that standpoint that the remarks of the court must be viewed and construed. The plaintiff in that suit sued his wife for a divorce, charging her with adultery; the wife denied the charges, and assuming the character of plaintiff in reconvention, prayed herself for a separation from bed and board, grounding her demand upon allegations of cruel treatment and outrages toward herself of such a nature as to render their living together insupportable; that he had deserted and abandoned the matrimonial domicile, leaving her destitute, and afterward resorted to a simulated and fictitious sale of the family homestead in order to dispossess her of the premises, and that he had since failed to contribute to her support. During the course of the trial, plaintiff offered testimony in rebuttal to disprove the allegation that he had driven her from the matrimonial domicile and to show that she had herself abandoned it in consequence of having been discovered in adultery. The court below refused to allow the evidence on the ground that it was not admissible under plaintiff's allegations. The District Court rendered judgment in favor of defendant on the plaintiff's demand, and also in her favor upon the reconventional demand, decreeing a separation from bed and ordering plaintiff to pay her alimony at the rate of sixty dollars per month during the pendency of the suit. Plaintiff appealed. On appeal this court affirmed the judgment in favor of defendant upon the main demand, but reversed it as to the reconventional demand and the claim for alimony, on the ground that plaintiff should have been permitted to introduce the evidence not in support of his action, but to break down the claims of the defendant. The case was remanded for a new trial on those particular branches. Referring to the claim for alimony *pendente lite* advanced under these circumstances and conditions, the court said it was of opinion that "plaintiff could not be compelled to pay this allowance if the record disclosed that no domicile had been assigned the wife *pendente lite*, as the evident object of the law is to provide her the means of maintaining a separate domicile 'during the suit for separation,' the selection of which the suit renders necessary. Inasmuch as the defendant confessedly left the domicile of her husband with-

out obtaining from the judge an order assigning her domicile pending her suit, it was manifestly impossible for her to make the proof required of her as a condition precedent to her recovery of alimony against her husband. It was of no consequence that the plaintiff did not urge formal exception or objection on this score *in limine*; the phraseology of the statute clearly imposes the burden of proof on the defendant to establish this essential ingredient of the demand and the plaintiff had a perfect right to rely upon her failure to discharge it as a substantial defence to the effect that he could not be compelled to pay her his allowance otherwise. On the state of the controversy thus formulated, we think the defendant's reconventional demand for alimony should be disallowed and rejected."

It will be seen that in case there was an utter absence of any assignment of a residence to the wife; also that the husband had made a direct attempt to offer evidence in rebuttal to establish that fact, which was an important one in the determination of the relations of the parties in that particular case. The case came to us under the gravest charges against the chastity of the wife sought to be shown. We dealt with the matter upon the hypothesis only that the plaintiff might have some evidence to support his charges—not that there was any actually produced. We say this in justice to the defendant in that case whose claim was that the charges against her were totally groundless and the result of a conspiracy between her husband and others against her. In the case at bar there was an assignment by the court of a residence to the wife and the case comes to us thoroughly free from complaint of any kind by the husband against her. There was nothing in the pleadings and nothing in the offer of the testimony by the husband in the District Court calling in question the fact of her having conformed to the orders of the court. The husband presents that question tardily when he raises it before us on appeal. We must presume, as matters stand, that he did not conceive the wife to have been at fault in this respect. We are of the opinion that Art. 148 of the Civil Code must be read (subject to exceptional cases) in connection with Art. 147, which declares that the wife shall prove her residence "as often as she may be required to do so."

This court has not been inclined to construe these articles with the rigidity which defendant's counsel contends for. *Jolly vs. Weber*, 36 An. 678.

The law designs that the wife shall be subjected to the supervision

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of the court, but over this matter the court itself must be left some discretion and control. The defendant seeks collaterally to call in question the exercise by it of that power in this particular case, first in establishing plaintiff's domicile outside of the State, and next in having given her a general permit to absent herself during the recess of the court on account of her health. If defendant thought the orders on this subject improper he should have sought to have them set aside. Defendant says the court was without authority to fix the residence of the wife outside the territorial jurisdiction of the court. The article of the Code Napoleon which corresponds with Art. 147 of our Code has been the subject of considerable discussion in France. Fuzier-Herman, under Art. 268, C. N., says: "Suivant la plupart des auteurs les juges ont un pouvoir souverain pour déterminer d'après les circonstances et bien-séances le domicile provisoire de la femme et le fixer même en dehors de l'arrondissement judiciaire. Favard Rep., Vo. "Separation entre époux, Sec. 2, No. 6; Marsol, 156, No. 9; Chauveau sur Carre, No. 2974 Demolombe, T. 4, No. 456; Devilleneuve note sur Rennes, 3 Avril, 1851 (S. 51-2, 721). Whether or not the power goes so far as to authorize the fixing of the residence of the wife, not only outside of the judicial district but outside of the State, as was done in the original order in this case, need not be determined, for the court had authority to subsequently modify it and did so. It is true that the terms of the permission granted by Judge King to the plaintiff in this case to absent herself from the Christian Woman's Exchange during the summer were general, but we are not informed that any improper advantage was taken of them. The court's order should not be used to her disadvantage. *Actus curiæ non gravabit*. The wife being plaintiff in the suit could always be controlled through the power vested in the court under Articles 147 and 148, C. C.

We think the District Court erred in fixing as the date from which alimony should be made to commence (if the situation of the parties was such as otherwise to call for it) as of the day upon which its judgment was rendered, but that it should have commenced to be exigible from judicial demand in the suit filed 25th November, 1891, in the District Court. The District Court has not passed upon the pecuniary situation of the parties during that period, and we are not satisfied with the condition of the record on that subject.

For the reasons herein assigned it is hereby ordered, adjudged

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and decreed that the judgment appealed from, in so far as it orders the defendant to pay plaintiff alimony *pendente lite* at the rate of thirty-five dollars per month from December 23, 1895, be and the same is hereby affirmed, but it is amended so as to leave open for future examination and decision by the District Court the claim of the plaintiff for alimony between the 25th day of November, 1891, and December 23, 1895, and the case is remanded to the District Court with instructions to make such examination and decision under the views herein expressed; appellee to pay costs of appeal.

48	847
120	625

No. 12,148.

THE STATE EX REL. JOSEPH COSSE ET ALS. VS. THE JUDGE OF THE
TWENTY-SECOND JUDICIAL DISTRICT COURT ET AL.

The courts exert control over public officers with ministerial duties connected with elections, and by the writs designated by law will compel the performance of such purely ministerial duties.

ON APPLICATION for Writs of *Certiorari* and Prohibition.

E. Howard McCaleb for Relators cites: 69 Fed. Rep. 862-3; 6 Wall. 50; 13 An. 90; 78 Ill. 261, *et seq.*; Merrill on Mandamus, par. 61; 25 An. 264; 82 Ill. 119; 28 An. 705.

James Wilkinson for Respondents.

Submitted on briefs April 15, 1896.

Opinion handed down April 20, 1896.

The opinion of the court was delivered by

MILLER, J. Under the election act of 1894, No. 181, the police jury is to establish the precincts and number of polling places in the wards of the parish, as many as deemed requisite, provided there shall never be less than one precinct, and the authority is given the jury to subdivide the ward, each subdivision to constitute a precinct. When this duty shall have been performed, the statute prohibits any change in precincts and polling places, except by a vote of two-thirds of all

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the members of the jury, and it is exacted the changing ordinance is to have the sanction of the two-thirds vote at two different jury meetings. This provision against changing, except under the restrictions stated, is manifestly to guard against improper changes of precincts and polling places once established, known to the voters, and the policy of the statute is further marked by the prohibition of any such change within six months preceding a general election. See Secs. 9 and 10 of the act.

The act requires the supervisors of election to give ten days' notice of every election by posting at each polling place to designate the polling places in the precincts established by the jury, and the appointment of the commissioners and clerks is directed to be made by the supervisors, the commissioners to be selected from opposing political parties. Act No. 181, Secs. 3 and 13.

The action of the lower court, we are called on to review, was based on the petition of a citizen and candidate for police juror, alleging, substantially, that the police jury, without observing the requisites of law as to the vote required or method of legislation exacted by the act, had undertaken by ordinance to change the limits of the Eighth Ward, and abolish one of the precincts of the Ninth Ward; that the supervisors of elections under the ordinance propose to locate only one polling place in each of the wards, instead of two as they existed in the election of November, 1894, the first general election after the passage of the election law; the petition alleged that the ordinance making the change was void and the proposed action based on it of the supervisors equally illegal; it was further averred the supervisors had been called on to make selection of good and competent Republican commissioners as by the act required, had refused to state they would comply with the request; and the intention not to make the appointments, but to deny accorded by law to the Republican party was charged with some detail. The relief prayed was a *mandamus* to compel the supervisors to locate the limits and polling places as they existed prior to the ordinance assailed; and requiring the supervisors to appoint Republican commissioners. An injunction to restrain the execution of the changing ordinance was sought, but that application was withdrawn. The answer in the lower court, and the petition of the supervisors in this court, insists the lower court had no jurisdiction of the issues; that officers clothed with functions connected with elections can not

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be controlled by the courts and on this theory we are asked to review and annul the proceedings of the lower court.

The courts have no power to control official action involving the exercise of discretion to be exerted by the officials without limit or qualification. In this case, if, as charged in the lower court, the ordinance changing the precincts and polling places was passed as charged, and not denied, without conforming to legal requisites, it was of no validity, and the precincts and polling places remained as they were before. The duties of the supervisors under the law—were purely ministerial in all respects connected with this controversy—that is, to designate polling places in the wards or subdivisions fixed by the jury, give the notice of election, and make the appointments of commissioners. We can not assent to the proposition that public officials clothed with ministerial functions connected with elections are beyond judicial control. With due appreciation of the authorities submitted, in our view the supervisors are under the control of the courts with respect to the functions imposed on them involved in this controversy. The other view would displace the methods of conducting elections provided by law, and substitute the volition or caprice of the official.

In this case there was no proposition to take from the supervisors the selection of the commissioners under the restrictions of the statute. The judgment of the lower court was that the supervisors should locate the polling places, post notice and appoint commissioners in the eighth and ninth wards as fixed in the November election of 1894.

We think the lower court had the jurisdiction to make this decree, and it is only the question of jurisdiction that we can consider on this application. The application to this court is denied.

DISSENTING OPINIONS.

WATKINS, J. Upon mature reflection, I am satisfied that the controversy in the respondent's court, of the proceedings in which the relators complain, were and are purely political, and of which he had no jurisdiction, and our writ of prohibition ought to be made perpetual. *State ex rel. Woodruff vs. President, etc.*, 41 An. 846; *State vs. Judge*, 13 An. 89; *State ex rel. Bonner vs. Lynch*, 25 An.

Fayssoux vs. Denis.

269; *State ex rel. Moncure vs. Dubuclet*, 28 An. 698; Revised Statutes, Secs. 1417 to 1435, as amended by Act 106 of 1882.

The duties of police juries, with regard to the selection of polling places and the like, are vested by the election law in the discretion of those bodies as political functionaries. Secs. 9 and 10 of Act 181 of 1894; *State ex rel. Blackman vs. Strong*, Secretary of State, 32 An. 173.

McENERY, J., also dissents.

No. 11,912.

C. J. FAYSSOUX VS. HENRY DENIS.

Assessments against the property owner for the cost of the banquettes or paving laid in front of his property under the provisions of the city charter are not taxes in the meaning of the articles of the Constitution, defining the jurisdiction of this court. Art. 81; 9 Rob. 333; 2 An. 330; 4 An. 1; 21 An. 51; 20 An. 499; Act No. 20 of 1882, Secs. 32, 33.

A PPEAL from the Civil District Court, for the Parish of Orleans.
Monroe, J.

W. B. Lancaster and Jno. Q. Flynn for Plaintiff, Appellee.

Defendant in *propria persona* for Appellant.

ON THE MOTION TO DISMISS.

The Supreme Court has jurisdiction of all cases in which the legality or constitutionality of a local assessment is at issue, whatever may be the amount. *State ex rel. Hill*, 46 An. 1292.

The charge imposed upon a property holder for the paving of a street opposite his property is a local assessment. 36 An. 549; *Burroughs on Taxation*, Chap. XXII; *Cooley on Taxation*, Chap. XX; *Dillon on Taxation*, Vol. 2, p. 1211.

Argued and submitted April 9, 1896.

Opinion handed down April 20, 1896.

Rehearing refused May 4, 1896.

48	850
51	806
51	1281
51	1298
51	1904
51	1905
51	1920
48	850
109	440

Fayssoux vs. Denis.

The opinion of the court was delivered by

MILLER, J. This suit is to recover from defendant the amount claimed to be due for paving in front of his property, laid by plaintiff under his contract with the city to perform the work at the cost of the front proprietor, as provided in the city charter, Act No. 20 of 1882, Secs. 32 and 33. From the judgment against defendant he appeals. The amount sued for is not sufficient to meet the jurisdictional test as to money demands brought here by appeal, and there is a motion to dismiss. The defendant contends the payment demanded is a tax, the legality of which is in contestation, and this issue is within our jurisdiction, irrespective of the amount for which this suit is brought. Const., Art. 81.

The argument for the defendant maintains that the liability of the property in this class of cases is to be supported only on the authority of the city to levy what are termed local assessments, and that class of exactions is, he insists, taxes in popular significance and are so treated in the text-books and decisions. In this connection we are referred to Burroughs and other writers on taxation and to the decision of this court in *Hill vs. Judges*, 46 An. 1292. It is true that local assessments, resting as they do with other conditions, on the compulsion of the law, are treated as part of the taxing power, but not subject to the restrictions of limitation or uniformity to which the tax in its ordinary significance is subject. Burroughs, Chap. 22; *Yeatman vs. Crandall*, 11 An. 222; *Draining Co.*, praying, etc., 11 An. 338. The tax is levied for the public benefit; the local assessment for the improvement of the property of the individual, and payment is exacted solely on the theory that he receives the benefit, not participated in by the community, at least, to the same extent. Taxes are levied, too, solely by virtue of the law conforming to the Constitution. No system of local improvements is enforced without some reference to the assent of the owner, for whose advantage the banquettes or street paving or other supposed improvement is furnished. It is true the assent of the majority or other proportion of the owners, fixed by the law, is made to bind those who object. But still there is the substitution of the will of the majority, for the consent of all or other similar requirement to make binding the local assessment. In this respect the assessment differs from the public tax, effective simply and only because the constitution authorizes and the law directs it. Under the city charter, the paving must be peti-

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tioned for by property owners, and if after due publication is not opposed by the majority, is ordered by the Council. While, therefore, the local assessment is deemed a tax, it is distinguished from the public tax by marked differences. The tax as usually understood is levied by the law alone, not for the individual but for the public benefit. The local assessment is enforced by the law, but based on the consent of the owners to the extent required by the statute, and is levied for the advantage, the law presumes, of those on whose property the assessment is imposed. The difference between the tax levied for the benefit of all and the local assessment imposed for the profit of the individual, and the conditions not required for the public tax, but indispensable to exact the local assessment, are so prominent that in common parlance the word tax is not applied to the liability of the owner for cost of the banquette or paving in front of his property. The Constitution is supposed to use words in their usual acceptance, and under that familiar rule of interpretation we do not feel authorized to attribute to the constitutional grant of jurisdiction to this court a meaning not, we think, in contemplation of the framers of the organic law. On a very recent occasion we had occasion to affirm the jurisdiction of this court of controversies respecting the constitutionality of the levee taxes. Our predecessors held such questions not within our jurisdiction. These levee taxes are certainly called local assessments in the statutes, and belong to that class of exactions. Constitution, Art. 214; Act No. 79 of 1890, and the other Levee Board Acts. These taxes are, however, levied for the public benefit, to protect the State from overflow, as well as to shield the land of the owner from the flood. The levees are part of the general system of taxation provided by the Constitution and exercised by the State directly, or by the Levee Boards, for the great purposes announced by the Constitution and laws. Constitution, Art. 214; Amendment Acts 1886, p. 149; Acts 1888, p. 8. In the accustomed uses of language these levee taxes are called by that name, and not local assessments. We therefore held that the Constitution in giving this court jurisdiction of controversies as to the legality or constitutionality of any tax, toll or impost whatever, contemplated these levee taxes, presenting, as we thought, in all essential respects, the tax in the contemplation of the organic law. Of course the reasoning of that case is to be construed with reference to the point be-

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fore the court. Our own jurisprudence discriminates these paving assessments from taxes. In *Lafayette vs. Asylum* the court held that an exemption from taxes did not embrace paving assessments. The court defined taxes to be burdens for public uses, that is general public taxes for the benefit of the State at large, and thus distinguished it from the local assessment. In *Crowley vs. Copley*, 2 An. 330, the court held that laws requiring the front proprietors to pay or contribute to making levees were not taxes in the sense of taxes used on exemption statutes. In *Police Jury vs. Mitchell*, 37 An. 44, this court dismissed the appeal of the riparian proprietor from the judgment in favor of the parish for his part of the expense of building or repairing the levee, the court holding that such a charge on the owner was not a tax in the meaning of the jurisdictional provision of the Constitution in reference to this court. In *City of New Orleans vs. Estate of Burthe*, 26 An. 497, this court held that local assessments for street openings were not taxation in the meaning of the constitutional rule of uniformity applied to taxes. Finally, in 20 Annual this court dismissed the appeal from a judgment for curbing a gutter in front of the defendant's property, done under contract with the municipal corporation under the law similar to that under which the plaintiff in this mode did the paving. To maintain this appeal we should have, in our opinion, to depart from a long line of authority resting, we think, on well-settled principles.

Our conclusion is the appeal can not be maintained, and it is adjudged and decreed that it be dismissed at appellant's costs.

No. 11,962.

MRS. BESSIE O'GRADY vs. MICHAEL LARKIN, HER HUSBAND.

A reconciliation between husband and wife, after the facts which might have authorized a suit for separation, is a bar to such action.

APPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Branch K. Müller for Plaintiff, Appellant.

W. H. Rogers and *W. K. Horn* for Defendant, Appellee.

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Argued and submitted February 29, 1896

Opinion handed down March 9, 1896.

Rehearing refused May 4, 1896.

The opinion of the court was delivered by

MCENERY, J. On March 24, 1894, the plaintiff brought suit against the defendant for separation from bed and board.

On May 17, 1894, the plaintiff discontinued this suit and she and her husband became reconciled and lived together until December 20, 1894, when the defendant husband abandoned the wife.

The present suit was filed January 25, 1895, alleging substantially the same causes that led to the bringing of the first suit. With this suit is accompanied a demand for the setting aside of the sale of certain immovable property to one Stephens, alleged to have been made to defraud the community rights of the wife. There was judgment for defendant, rejecting her demands, both for the separation, and for setting aside the sale to Stephens.

None of the causes for the action of separation which existed, prior to the reconciliation, can now be urged, but if new causes have occurred the facts which existed prior to the reconciliation can be used as corroborative evidence. C. C. 152, 153.

No cause has arisen for a new suit since the reconciliation. In November following the date of the reconciliation, there was an altercation in their room at the house where they were boarding. But a reconciliation followed this, and when the husband left the wife they affectionately parted.

The abandonment is a distinct cause for separation, and certain acts are required of the plaintiff before the decree can be rendered. C. C. 145.

The husband returned to New Orleans, but never went to the place where he had left his wife.

Her right to demand a separation for abandonment should be reserved, and also her action to rescind the sale made to Stephens, which it is alleged was in fraud of her community rights.

It is ordered, adjudged and decreed, that the judgment against the wife, rejecting her demand for separation, be affirmed, reserving her rights to sue for separation on account of abandonment, and the judgment in favor of Owen Stephens be reversed, and one as in case of non-suit be entered, the defendant to pay costs of appeal.

State vs. Brooks et al.

No. 12,094.

STATE OF LOUISIANA VS. ARTHUR BROOKS ET AL.

The surety on a bond is not released by the fact that a *nolle prosequi* was entered on motion of the District Attorney, because of irregularity in finding the indictment. The defendant and his surety were properly held to answer to another indictment returned in lieu of the bad indictment.

A PPEAL from the Eleventh Judicial District Court for the Parish of St. Landry. *Perrault, J.*

M. J. Cunningham, Attorney General; *E. B. DuBuisson*, District Attorney; *P. A. Simmons*, of Counsel for State: cite 34 Ark. 610; 6 Tex. App. 188; 3 Bush. (Ky.) 22; *United States vs. Reese*, 4 Sawyer, 629.

R. L. Garland and *E. P. Veazie* for Defendants, Appellants.

Submitted on briefs April 11, 1896.

Opinion handed down April 20, 1896.

Opinion of the court was delivered by

BREAUX, J. The accused was indicted for robbery on October 7, 1895, and on the same day they were bailed. Subsequently the District Attorney moved to have the grand jury purged of one of its members against whom there was an indictment pending. The motion having been granted the jury was instructed to find new indictments against all accused unarraigned. October 12, 1895, the grand jury presented another indictment against the accused for the same offence.

They were, in due time, called for arraignment and did not respond. At a subsequent term of the court the accused were again called for arraignment; one of them, *Adolph Jackson*, did not answer.

On the District Attorney's motion, after due proof, the bond was forfeited and judgment entered against the accused and the surety on his bond. After the judgment had been rendered a *nolle prosequi*

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was entered on the motion of the prosecuting officers, discontinuing the prosecution on the first indictment for the reason that one of the members of the grand jury, before it had been purged, was not competent to serve as a juror. A motion to have the forfeiture rescinded was filed on the ground that the surety on the bond was released by the *nolle prosequi* entered as to the first indictment.

After having heard the evidence the District Judge overruled the motion to rescind. From the judgment the surety prosecutes this appeal.

The question for our decision is whether the surety is bound by recognizance that an accused shall appear to answer to a particular indictment against him, after the District Attorney enters a *nolle prosequi* as to that indictment and the grand jury brings in another for the same offence?

In our view, if the defendant fails to appear to answer to the second indictment the recognizance is forfeited.

The defendant having been held to bail is deemed to be in custody of the court (as if imprisoned) to answer for the charge against him. The indictment may be bad, and yet he may be held to answer to the charge as set forth in another indictment. We are of opinion that the District Court correctly held that the bond had been forfeited. The provisions of the bond were not only to appear, but also not to depart without leave in matter of the crime charged.

Judgment affirmed.

 No. 12,002.

 CRESCENT CITY RAILROAD COMPANY VS. NEW ORLEANS & CARROLLTON RAILROAD COMPANY.

In order to authorize one street railway company to occupy the tracks of another there must be legislative permission for the same, or it must result from such necessary implication from the grant that the abandonment of the grant would necessarily result from the non-occupancy of the roadbed of the street railway first occupying the street.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Farrar, Jonas & Kruttschnitt for Plaintiff, Appellant.

48	856
49	678
49	682

48	856
119	777

Henry P. Dart for Defendant, Appellee.

Argued and submitted March 9, 1896.

Opinion handed down April 20, 1896.

The opinion of the court was delivered by

McENERY, J. The plaintiff and defendant are street railway corporations.

The latter was in position on Carrollton avenue, when a change of route was granted to the plaintiff corporation to run through the same street on the neutral ground. This expression "neutral" ground has occasioned some confusion in the interpretation of the grant to plaintiff. Neutral ground had its origin in its application to the unclaimed part of Canal street, which was the dividing line between two municipalities. It has no significance in its application to other streets. The centre of Carrollton avenue was occupied by a gravel road before the defendant's road was located thereon. On either side there was a wide space unoccupied, but used at times as a playground. The City Engineer located the plaintiff's road under the grant to them to pass through Carrollton avenue on what he then construed to mean the neutral ground. This location was accepted by the plaintiff and it commenced work for the construction of its track as located. This location did not interfere with the defendant's tracks. The plaintiff, for some reason, abandoned work on its location, and about a year afterward the City Council, by ordinance, declared the neutral ground to be the centre of the street through which the defendant's railway was located. In this ordinance there is no grant to the plaintiff's road to run over the tracks of the defendant.

In plaintiff's brief it is stated that the facts make a street a neutral ground, and not any ordinance of the City Council.

To the time that the ordinance declaring the centre of the avenue, on which defendant's road was located, neutral ground, the neutral ground of the avenue was the unoccupied part of the street. This is the testimony of the City Engineer. Williams, an engineer, who had always lived in Carrollton, and on Carrollton avenue, says in his testimony that when the grant to plaintiff was made the sides of Car-

rollton avenue were grass-grown and used as a playground, which up to 1892 was considered as neutral ground, so far as appearances warranted such designation.

From his earliest recollection the centre of the avenue was occupied by a roadway until a graveled roadway was built. It was after the making of this gravel road that the defendant's road was constructed on it. Therefore there is no force in the argument, because a part of what was once neutral ground is now graveled and improved, it could not have been the intention of the city government to permit a road to be built on it.

There is no question of the intention of the City Council involved in this question. It is a fact at issue whether or not the geographical features of the avenue are such as to compel the occupancy of defendant's roadbed. If they are not of that character, no grant by implication can be inferred.

The grant to the plaintiff is that it shall construct its road on Second from Broadway to Carrollton avenue, thence through the neutral ground of Carrollton avenue to Fourth street, and thence along Fourth to the parish line. There was no legislation declaring any part of the street neutral ground when this ordinance was passed, and the passage of the ordinance subsequently is an evidence that no designation had been given by the city to any part of the street as neutral ground. The only neutral ground to which the ordinance could apply was to the unoccupied part of the street.

The ordinance could not, after the grant, by simply designating a part of the street neutral ground, give any additional powers not conferred by the ordinance. Nor could it thus authorize, by mere implication, the plaintiff to occupy a part of the street, which right had not been previously conferred.

After the passage of the above ordinance, the plaintiff corporation attempted to go on defendant's tracks, and invoked the proceedings in this suit to expropriate the roadbed, cross-ties, etc., necessary for its occupancy of the defendant's tracks.

The question at issue is, can a street railway company, occupy the track of another, unless by express authority or by necessary implication.

In several cases we have decided that by special grant of legislative authority, one railway company, to reach its destination to its terminal point, may occupy the tracks of an existing company. In

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the grant to the plaintiff this doctrine was recognized, as authority is [given them] to cross and occupy certain tracks until they reach Carrollton avenue.

But as to Carrollton avenue there is no authority granted to occupy the track of the defendant corporation. Was then this permission given by necessary implication?

On this point we are without precedents in our jurisprudence. But as the decrees in the cases of Railroad Company vs. Railroad Company, 41 An. 564; Railroad Company vs. Railroad Company *et al.*, 44 An. 490; Railroad Company vs. Railroad Company, 44 An. 54; Railroad Company vs. City, 44 An. 730; Railroad Company vs. City, 44 An. 748; Railroad Company vs. Railroad Company, 44 An. 1071, were based on the authorities from other States, which had preceded us in street railway facilities, this court ought to look to the authorities in the other States for instruction and for precedents.

In Sharron Railway Company, 9 American State Rep., 133, it was held, to justify the taking by one railroad company for the same use, under the right of eminent domain, the land acquired by another company, which is necessary for the latter to economically and expeditiously carry on its present and prospective business, that there must be a necessity so absolute that without it the grant itself would be defeated, and not a necessity created by the company itself for its own convenience or sake of economy.

In this case no question can arise as to the impairment of the obligation of a contract, except so far as stated in case of Railroad Company vs. Railroad Company, 44 An. 491, that a street railway occupying the tracks of another can not interfere with the company's road, over whose tracks it runs its cars, so as to disturb its schedule time, in accordance with its contract with the city, and thus practically evict it from its roadbed. And here we will state that the necessity for express permission by the City Council, or an implication from the authority granted, exists, so that the schedule time of the road first occupying the street can not be interfered with.

In granting the authority the city must undoubtedly have the opportunity of so expressing itself as to shield itself from damages.

In the collation of the authorities in the case referred to, under the head of "*How Legislative Intent must be Expressed*," we find it stated and amply supported by citation of authorities that an "implication does not arise except from the language of the legislative

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act, or from its being shown by an application of the act to the subject matter to be a necessary condition to the beneficial enjoyment and efficient exercise of the powers expressly granted, and then only to the extent of the necessity." "There can be no implication," says the Supreme Court of Pennsylvania, in speaking of the right of a railroad company to take by implication a portion of the road of a street railway, "unless it arises from a necessity so absolute that without it the grant itself will be defeated. It must also be a necessity that arises from the very nature of things over which the corporation has no control; it must not be a necessity created by the company itself for its own convenience or for the sake of economy. Pennsylvania Railroad Company's Appeal, 93 Pa. St. 150; Appeal of Pittsburg Junction R. R. Co., 122 Pa. St. 511."

In the matter of the City of Buffalo, 68 N. Y. 167; 118 Mass. 391-561.

Alexandria & Fredericksburg Railway Company vs. Alexandria & Washington Railroad Company, 40 Amer. R. 743, and cases cited in note.

The several cases referred to herein in our reports, and the invariable doctrine announced in the other States of the Union is that a street [railway company owns the structure laid by it in the highway and have a superior right to the space covered by its tracks, Pierce Railroads, 252; Woods Railway Law, Sec. 229, p. 681; 14 Gray, 69; 76 N. Y. 530; 34 Iowa, 527.

And its rails can not be used by other competing common carriers, driving railway carriages without special legislative authority. Woods Railway Law, 681; 72 N. Y. 330; 4 Stew. (N. J.) 525; 81 Ill. 528.

On page 681, Woods Railway Law, it is stated that "a franchise can not be taken under the general law, but must have for its basis legislative authority, or must arise from necessary implication."

And on page 703, the same authority says: "In the construction of railways, it necessarily occurs that highways and other railways must be crossed, and although the power is not expressly given, it is necessarily inferred. But authority to take the bed of either a highway or railway longitudinally for any considerable distance will not be inferred, especially when it is possible to build the road without doing so." As a conclusion from all the authorities, the same author thus expresses what is a permission by implication to interfere with

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the franchise of an elder grant: "If, however, the two grants can not stand together, and upon an application of the grant to the subject matter it is found that the latter will be defeated unless it is permitted to interfere with the franchises of another corporation, the presumption is raised that such interference was contemplated by the Legislature" (p. 699).

In the instant case there was no permission granted to plaintiff to use the rails or roadbed of the defendant company. There is nothing in the situation of the locality which both railways are permitted to occupy to justify a permission by implication to use defendant's roadbed and tracks, or to disturb its franchises.

The only unoccupied ground which could be designated as neutral was that on either side of defendant's tracks. This neutral ground was accepted by plaintiff as the territory it was to occupy. The subsequent resolution of the Council simply declaring the space occupied by defendant as neutral ground was an absurdity, as the Council could not change the meaning of words, and, as said in plaintiff's brief, make that neutral ground, which, in fact, was not. The testimony in the record shows that the space first allotted to plaintiff's road is sufficient for its purpose; will not interfere with defendant's franchise; and will not interrupt or disturb the use of the street or avenue.

There is not an authority anywhere that does not hold that the grant to occupy the tracks of a railroad company by another competing company by implication, the implication must be such that the grant would be defeated without the use of the tracks. Here the competing company has a large space to occupy without interfering with the defendant's franchise.

What is the franchise granted to defendant? It is that it may construct a road through Carrollton avenue on unoccupied territory. There is not a word said about the use of defendant's road bed, and the use of defendant's track does not spring from any necessary implication, as there is ample territory assigned to plaintiff to construct its road without interfering with defendant's roadbed.

Judgment affirmed.

DISSENTING OPINION.

MILLER, J. The plaintiff, with a franchise for a street railway extending through the neutral ground of Carrollton avenue, seeks to

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compel the defendant, the New Orleans & Carrollton Railroad Company, to permit the use of its tracks laid, it is alleged, on the road-bed granted to plaintiff; the use to be jointly possessed by the two companies, and on suitable compensation to be paid by plaintiff. The defendant excepted that the petition showed no cause of action; that plaintiff had no right to use defendant's tracks; and that plaintiff's purchase is void for failure of the Council to comply with the law in granting the purchase. The exceptions referred to the merits were renewed in the answer, with the additional averment that defendants, in possession of its tracks for years, had expended money in laying them, and plaintiff had no right on the tracks. From the verdict and judgment in defendant's favor, plaintiff appeals.

The plaintiff, operating a street railway in this city, obtained by transfer the right to extend its tracks to the line of Jefferson parish, on designated streets, of which Broadway was one, but before the privilege was exercised, the city by ordinance of September 9, 1892, authorized the purchaser of the franchise to construct the road through the neutral ground of Carrollton avenue, from Second to Fourth street, thus substituting the avenue for the distance named in lieu of Broadway. The City Surveyor, under this change, gave the plaintiff lines for the construction of the road on that portion of the avenue adjoining the banquette on the lower side. Thereafter the Council by ordinance defined the neutral ground to be the central space of sixty-six feet lying between the strips of thirty feet wide on either side next to the banquette. Then the surveyor gave plaintiff lines to run on this neutral ground. This brought about the contention now before us, as plaintiff's lines were over the defendant's tracks.

The ordinance under which defendant laid its tracks preceded that of plaintiff, and assigned the upper side of the avenue. The upper side might well have been deemed the space of thirty feet next to the upper banquette. No question is raised on that point, plaintiff only claiming the common use of defendant's tracks, laid as they are on the upper side of the neutral ground, designated as the space through which plaintiff's tracks are to pass.

We have given attention to the argument and authorities cited by defendant to support the contention that our law affords no warrant for expropriation proceedings in this case. The right to use the streets for railway purposes can not be obtained by expropria-

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tion, but is derived from the municipal authorities clothed with the power to regulate the use of the public streets. City Charter, Acts 1882, No. 20, Sec. 8; Elliott on Street Railways, p. —; Brown vs. Duplessis, 14 An. 842. The plaintiff in this case asserts the right claimed to be conferred by the city ordinances. The taking or rather the joint use of defendant's tracks this suit seeks to enforce is merely incidental to the ordinances under which plaintiff claims. There is, hence, in our opinion, no room for the discussion of the right of expropriation in the usual sense of that power; the plaintiff's right, if it exists, being derived from the ordinances. The right of the city, after selling to one company a street franchise, of giving to another company the use of the tracks embraced in the first franchise, is, of course, restricted, but, within the appropriate limits, is conferred by the city charter. The provision is: The city shall have the power to require and compel all lines of railway, in any one street, to use one and the same track; and it announces the policy in the public interest that no street shall be unnecessarily obstructed with a number of tracks when one will suffice. If then the ordinances relied on authorize plaintiff to use the defendant's tracks for the short distance of fourteen hundred and forty feet, thus obviating two lines of tracks on an important thoroughfare of this city, in our view the case presents the mere question of the exercise of police power, and calls for no examination of the scope of the right to expropriate.

The exception of no cause of action raises the question, whether the ordinances relied on by plaintiff confer the right to use defendant's tracks. It is true the ordinances do not refer to the tracks, but plaintiff's contention is, the right to their use is given by necessary implication. The Council, in designating the neutral ground of Carrollton avenue as plaintiff's roadbed, supposed that the words used carried an accepted significance, applied to an avenue with a well defined central strip. There was testimony that the strips of thirty feet, next to the banquettes on either side, were deemed neutral ground by the people in the neighborhood. Such significance, we think, to whatever extent it may have existed, was purely local, not apt to be the sense of the Council or, indeed, of any one employing the words to designate a portion of an avenue. In their usual acceptance the neutral ground of a wide avenue would be deemed to refer to the central space bordered by trees, and not

to the strips of thirty feet wide on each side next to the banquette. Without any other light than that afforded by the ordinance itself, it seems to us it would be a most arbitrary construction to apply "neutral ground" to either strip and not to this central space. There are other avenues of this city of which we take notice like that in Carrollton. It would hardly occur to any one to call the strips or streets on either side of Canal or Esplanade streets neutral ground. If he used the terms, the reference would naturally be accepted as referring to the large space or middle ground, and on which it is pertinent to notice the city railways on those avenues are placed. In some of the earlier railroad ordinances the words "neutral ground" are used, and the centre and not the sides or streets were understood to be intended, and the roads located accordingly. See Ordinances City Railroad, etc.; Leovy Ordinances, pp. 437, 458, 466. As a question of construction required of us in this case, without other aids than the ordinance, we should hold that neutral ground of Carrollton avenue referred to the central space of sixty-six feet. But we are not left to the original ordinance. The Council by its subsequent ordinance defined neutral ground as this central space. If, as must be conceded, the Council had the power to give this right of way, there is no conceivable objection to the defining ordinance, if the roadbed was not stated with precision in the first. It is said the plaintiff at first received lines from the surveyor, assigning the lower strip of the avenue for the roadbed, and then began to construct the road. But both the plaintiff and the city abandoned that interpretation of the ordinance. If the plaintiff begun wrong, we do not appreciate it was bound to persist in the error. If the ordinance, whether original or as amended, gave to plaintiff the neutral ground for its roadbed, there was no impediment to the plaintiff availing itself of its right. In our view, under the plaintiff's ordinance, it acquired the right to build its road over the central space of sixty-six feet of the avenue. That interpretation of the neutral ground would be natural under the original grant, and is exacted by the plain terms of the amended ordinance to have effect the same as if part of the grant first conferred.

On the sixty-six feet through which the plaintiff is authorized to lay its tracks is a gravel road, twenty-five feet in width, which is the thoroughfare for vehicles extending from Carrollton to the rear. The road occupied part of the sixty-six feet when the ordinance was

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passed and for years before. On the lower side of this road is a row of trees ten feet in width, next the road is a space of five feet left, we presume, for the safe passage of the defendant's cars, the tracks of its cars occupying eighteen feet alongside the five feet space and succeeding the eighteen feet on the upper side is another row of trees of ten feet. The sixty-six feet is thus already taken up to the extent of fifty-eight feet. There is no room for the plaintiff's tracks, unless to the exclusion of the gravel road, or over the defendant's tracks. With the power of the city to compel the common use of the tracks, and under the ordinance giving plaintiff part of the space of sixty-six feet, the City Surveyor gave the plaintiff lines over defendant's tracks, as the only method of executing the ordinances. The defendant resists this use of its tracks. If its contention is successful, the plaintiff can have no tracks on the sixty-six feet, unless it can be maintained the ordinances take from the public the thoroughfare in use for years and established at great expense. Can any such purpose be attributed to the ordinances; or in other words is that construction consistent with the tests that guide rational interpretation? The gravel thoroughfare within the sixty-six feet is not appropriately to be designated as neutral ground. We can not suppose, in passing the ordinances giving the right of way through neutral ground, it was the intention to destroy a public road necessary to the public, and in actual use. In view of the fact that without encroaching on this road there is copious space for both companies, if they use the same tracks, the conclusion that was the purpose seems the only reasonable interpretation of ordinances of the city, vested with the power to compel the common use of tracks by companies having franchises on the same street. We are fortified in our interpretation by the action of the city authorities, in exercising the police power of regulating the use of the streets. There is, in our view, no basis on which we can substitute another construction compelling the laying of four tracks on an important avenue, when two will suffice, and a construction too that leads to the unnecessary deprivation of a roadway in use by the public. We think the action of the City Surveyor was within the scope of the ordinances.

It is claimed that the ordinances of the plaintiff are not legal, because it is supposed they convey street franchises not sold at public auction, (Acts 1888, No. 135). The law requires such sale of a street

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line of railway. In this case the ordinances supply merely the means of connecting lines above and below the avenue by giving the use of the avenue for the short distance of one thousand four hundred feet. No such connection could be sold, and hence can not be deemed within the scope of the Act of 1888. Impressed as we are with the duty of upholding this act of 1888, and waiving any expressions not called for in this case, we are of opinion that the controversy presents no infringement on the act.

When the city requires the use by two companies of the same tracks, there are the resulting obligations that the company holding the first franchise must be indemnified for the damage incident to yielding up its tracks; that the reconstructions for adapting the tracks to the common use be paid by the company holding the last franchise; that the cost of maintenance shall be borne equally, and that the reconstruction shall be made with the least inconvenience to the first company. Railroad vs. Railroad, 47 An. 314.

A decree in plaintiff's favor, under the circumstances suggested, is, I think, the proper solution of the controversy. I therefore dissent from the opinion and decree.

BREAUX, J., concurs in this dissent.

 No. 12,042.

MRS. F. A. SCHNEIDAU ET ALs. VS. NEW ORLEANS & CARROLLTON
RAILROAD COMPANY.

Where a child of the age of four years, a passenger on a street railway car, is accompanied by a person of sufficient age and discretion to take care of it, is put off the car at the child's stopping place, by the conductor, and the person having charge of the child follows it, and both reach the street in safety and are waiting for the passing of a car on a parallel track, the railway company is not responsible in damages, if the child runs toward the passing car, strikes it and is thrown down and injured.

APPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Bernard McCloskey and William L. Hughes for Plaintiff, Appellant.

J. M. Bonner for Defendant, Appellee.

Schneidau et als. vs. Railroad Co.

Argued and submitted April 20, 1896.

Opinion handed down May 4, 1896

The opinion of the court was delivered by

MCENERY, J. The plaintiff sues as natural tutrix of her minor child to recover damages for severe injuries inflicted upon him by one of defendant's cars. The case was submitted to the lower court, without intervention of a jury, and there was judgment for the defendant.

In the original petition the complaint is that the child, who was about four years of age, was knocked down and injured by one of defendant's cars, while a passenger on the same. An amended petition was filed in which the cause of action was alleged as follows:

"That said child was a passenger in the car going in the direction of Carrollton, and was removed from said car by its conductor and placed on the street before the person in charge of said child had alighted. That neither said child nor the person in charge of said child was notified that a car was coming at a rapid rate of speed from the other direction of the line of said railroad company, nor did the conductor of said car, upon which the said child was a passenger, notify said child or the person in charge of said child that said car was coming, and it was an act of negligence to place said child on the public street ahead of the person in charge of said child and that the want of notice constituted negligence."

A young lady aged sixteen was in one of defendant's cars, in charge of her brothers, both young children. The young lady notified the conductor to stop at Nashville avenue. As she had directed the car stopped in order that she and the children in her charge could get off. The four-year-old boy was put off by the conductor, the young lady saying, in her testimony, that she was on the steps when the child was placed on the ground. At this time one of defendant's cars was going down town in an opposite direction from the car in which the young lady and the children were passengers. But the young lady and the children had safely been placed on the ground and were standing at the point where they had alighted, when the down-town car was approaching. The youngest child started for his home near by, and as he approached the track the motorman in the approaching car, who had previously shut off the power, and the car was going by its own momentum, saw the child approaching the

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track, and immediately applied the brakes. The front of the car passed the child and he ran into it somewhere between the front and rear trucks. It is important to determine whether the person in charge of the children had gotten off the car, and was waiting for the car to pass. There can be no doubt of defendant's liability if the conductor deliberately placed a child of such tender years on the ground unprotected, in the presence of a passing car.

The young lady says: "I had gotten off the car and started across when the accident happened." She locates herself when the accident happened by saying she was "a few steps from the car that ran over him," and was standing on the lake side of the up-town track. The car which she had left had moved off. The youngest child started to cross the track while she was standing with the other child where she had left the car.

She did not see the child when he started toward the track.

This testimony is corroborated by witnesses for the defence.

In another part of her testimony the young lady says: The moment the little fellow was put out, he started diagonally across from the upper to the lower crossing and her brother started to follow him, and she had got very near the track with the second brother when the accident happened.

T. Hochart, who saw the accident, says he was at the corner of Nashville avenue and St. Charles, and he saw a young lady get out of the car with two children and another lady, and they were standing just where the car stopped, waiting for the car coming down to pass. "Then I saw a little boy turn loose and go over before the car had reached the corner. The gong was ringing, of course, and the boy struck the car right in the middle of the car and had his hand just cut here."

L. E. Turner, another witness, says he was in the car that injured the child and that there "was a lady and a child or two of them. I noticed them on the other corner ahead. The child ran over toward the car we were in and immediately there was a scream, and I jumped out and ran and picked the child up, and I saw this young lady, they told me was the sister of the child." He says that the child ran into the midway of the car.

J. Milford says he was in the car which injured the child. "After crossing the corner, the other car that those people had come out of had stopped, and this car I was in, the motorman of the car I was

in, he got then within fifty or sixty feet of the crossing and had begun to sound his gong. When the car I was in got very near to the corner where the people were standing this lady—there was two women and two little boys * * * was standing at the corner and the car began to start out, and the girl had this other child by the hand, and just as the car was in the crossing the boy breaks and runs diagonally across, and the car strikes the child in the head and knocks it down, and the car ran then about twenty feet and it stopped.” He says the child ran into the car “just where the front wheels had passed.”

G. W. Sievers says he was in the car with the young lady and the children. He was on the rear platform and saw the child run into the car, striking against the bolt on the side of the car behind the front wheels.

O. T. Dreux, who was motorman on Car 63, against which the child ran, says: “When I got to Eleanore street, that is a half a square above Nashville avenue, I noticed Car 34 stop at the corner, putting some passengers out. The rule of the company is, when you see a car stop to put out passengers to ring the gong, and I shut my power off and let my car roll, and commenced ringing my gong and kept ringing until I got even with the car that stopped, and I noticed this little child running toward my car, and I started to put my brake on as fast as I could, and I could see the child running to the car after the car had passed him, and I stopped the car about seven or eight feet below the lower crossing, and I ran back because I heard this lady screaming, and when I got there Mr. Trepagnier already had run back and picked the child up.” He says he could see the child running and that he was likely to run into the car, and that he applied the brakes and stopped the car as quick as he could.

Owen McMahon, who was the conductor on the car in which the young lady and children were passengers, says he got down from the platform, assisted the youngest child out, then the other, and finally the young lady, and then started on his way with the car. He had gone about ten feet when he saw the child start toward the track; stopped his car and endeavored to reach the child to save it. He says the child ran into the car about midway. He also says he cautioned the young lady that a car was approaching, but she denies this. But if the conductor could see the car, she also could see it. The preponderance of testimony is, that she was standing where

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she had alighted, when the car was approaching. The young lady was old enough to appreciate impending danger. She had been trusted with the care of the children. We do not find any negligence on the part of the defendant. The question presented is one of fact, whether the conductor had negligently placed the child of such tender years unprotected on the track in the presence of approaching danger. From the evidence we conclude that the finding of the trial judge was correct.

Judgment affirmed.

48	870
119	644

No. 12,095.

LAKE BROS. & CO. VS. HENRY GUILLOTTE, TAX COLLECTOR.

The importer of the several pieces of the umbrella or of the parasol, already in a state of preparation, save certain work on some of the pieces of minor importance, is not deemed a manufacturer.

The exemption of the Constitution is of textile fabrics and of capital and property employed in the manufacture of furniture and other articles of wood.

The processes whereby, in plaintiff's factory, the articles already prepared elsewhere are given the shape and finish of the umbrella for sale in commerce are not the manufacture of articles of wood and of textile fabrics which would entitle the manufacturer to exemption under Art. 207 of the Constitution.

A PPEAL from the Second City Court of New Orleans.
Morel, J.

J. Zach. Spearing for Plaintiffs, Appellees.

E. A. O'Sullivan, City Attorney, *G. W. Flynn* and *L. O'Donnell*, Assistant City Attorneys, for Defendant, Appellant.

Argued and submitted April 20, 1896.

Opinion handed down May 4, 1896.

The opinion of the court was delivered by

BREAUX, J. The plaintiffs sue to annul the assessment on their machinery and other capital. They aver that they are manufacturers of umbrellas and parasols, and claim exemption on the ground that they are manufacturers of textile fabrics and other articles of wood.

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The facts proved, which appear material, were that the materials consisted wholly of articles brought here from elsewhere in different sizes suited to adjust into umbrellas.

We are informed that the cloth was received in bolts; after inspection it was cut to the shape in which it is used in the umbrellas; the pieces after the cutting into the required sizes are sewed together by means of a machine.

The sticks or rods are received in a certain state of preparation. At plaintiff's works in this city they are reduced in their length; two slots, the one near the handle and the other near the top, are sawed in these sticks by a circular saw; wire springs are inserted in these "slots" or "grooves," and the sticks are tipped with a small ring of metal. The "notches" and "runners" are received in packages; and the cloth is adjusted to the ribs attached to the stick or rods by means of the "runners" and "notches."

The judgment in the lower court was pronounced for plaintiffs. The defendants appeal.

Each article used was intended when it was manufactured as part of umbrellas. They have been changed here from parts of umbrellas to umbrellas.

It would be extraordinary if the spirit of the article of the Constitution, in its protecting policy, should include articles manufactured elsewhere and brought here to be fitted together and given the shape for which the different parts were intended.

The articles in question were manufactured by others than plaintiffs, and were, by the latter, fashioned into umbrellas, by applying labor and skill, it is true, not to the extent, however, of securing the exemption accorded to the manufacturer. The word manufacture has a more comprehensive meaning than the processes employed in combining, fitting and adjusting the several pieces of the umbrella.

The work in Louisiana is infinitesimal as compared with the work elsewhere on the different articles. The limited work performed here is not manufacturing as generally understood.

Those engaged in the manufacture of textile fabrics and articles of wood are exempt. But the cloth used is not manufactured here and little work is required after it is received, much less than is applied in making coats and trousers out of jeans cloth. •

As to the exemption of these, this court has decided that one engaged in cutting and making coats and trousers out of jeans cloth,

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which has been already manufactured by another, is not engaged in the manufacture of textile fabrics.

Unquestionably, if those who are engaged in making coats and trousers out of jeans cloth are not exempt because they do manufacture the cloth, those engaged in cutting and sewing pieces together and attaching them to umbrella frames are not exempt. *Cohn & Feibelman vs. Parker*, 41 An. 894.

As to the articles of wood, we have seen that they, the rods and handles, are in a state of preparation when received. Tipping the sticks with a ferrule, and sawing two very short "slots" on each, is not manufacturing, within the intendment of the article of the Constitution.

In the Brooklyn Cooperage Company case, 48 An. 1314, to which our attention is directed, no hogsheads were made in plaintiff's establishment; the materials were all imported and the work consisted in setting them in barrel form. As in the cited case, in the case here, the parts of the umbrella are put into shape and no umbrellas are made in plaintiff's establishment.

It is therefore ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed, and that plaintiffs' demand is rejected and their suit dismissed. Costs of both courts to be paid by plaintiffs.

No. 12,113.

J. AND L. DREYFOUS VS. HENRY A. CHILDS ET AL.

FELIX LOEB & BROS. INTERVENORS.

Notes secured by a mortgage and vendor's privilege pass to third persons, with mortgage and privilege by which they are secured, unaffected by the unreality of the transaction (at the origin), of which the holder by transfer had no notice. If one of the two debtors *in solido* be solvent, the creditor is without a right of action to have annulled a transaction of the insolvent debtor.

A PPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

Walter J. Burke for Plaintiffs, Appellees.

Andrew Thorpe and *Thorpe & Barber* for Intervenors, Appellants.

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Argued and submitted April 22, 1896.

Opinion handed down May 4, 1896.

The opinion of the court was delivered by

BREAUX, J. The defendants allege the indebtedness of plaintiffs and pray for solidary judgment against their debtors. They also aver, in their petition, that one of the defendants, Childs, was insolvent and executed an authentic deed of sale of immovable property, for which there was no consideration; that it was a mere simulation for the purpose of placing the property beyond the reach of creditors; that credit notes were made by the purchaser for the purchase price, which they feared would be transferred to third persons unless restrained by the writ of injunction, for which they prayed. Contradictorily with the purchaser from Childs, they also prayed that the act in question be annulled and avoided in so far as their interests were concerned.

The defendants answered and pleaded a general denial.

The intervenors, Felix Loeb & Bros., alleged that they are the owners for value and before maturity of the notes delivered by Robertson to Childs secured by mortgage on the property sold by the latter to the former, and that they were prompted to purchase these notes by the fact that they were thus secured. The averment of intervenors that they became owners prior to maturity is supported by the uncontradicted evidence of the defendant Childs, who testified that they were negotiated by him, some time before the suit here was brought on plaintiffs' notes. The notes of intervenors were not matured when suit was brought. They were notes negotiable in form. They were paraphed by the notary and identified with the act of mortgage duly recorded at the date the deed was signed. The judgment in the District Court was for plaintiffs against Childs and Martin *in solido* on the notes, upon which the suit was brought by them; and as against Robertson, the court decreed the sale and mortgage from Childs to him to be a simulation and ordered the sale of the property for the payment of plaintiffs' claim and rejected the mortgage claimed by the intervenors.

The intervenors appeal.

The issues here are limited to plaintiffs, and intervenors, who are third persons, and who allege, in substance, that they were war-

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ranted in considering the deed of sale of record as of itself conferring title and the special mortgage and vendor's lien upon the property in all respects binding and legal; that the verity of the recorded act had remained unquestioned nearly a year; that the vendor had the right to sell and the vendee the right to buy, and that as there was nothing to excite suspicion they became the holders of the notes secured as already stated.

The plaintiffs, on the other hand, disclaim all concern in the notes of intervenors thus secured; they only assail the mortgage on the property sold and contend that, different from negotiable paper, it is not protected by the rule of the commercial law applying to such paper transferred before maturity.

This court has, in a number of cases involving the right of innocent creditors as holders of mortgages, based its decision on the principle that a mortgage, though a real right, is valid against creditors in the situation of plaintiffs here, who remain inactive and permit them to be transferred without objection.

The plaintiffs allege that Childs was insolvent at the date of the sale in question, and yet during a number of months the (plaintiffs) creditors remained silent, although the registry of the title was made in the parish of their residence.

For the convenience of business a probative and even convincing force is given to public records.

This court in *Bank vs. Flathers*, 45 An. 75, 80, reviewed a number of decisions. The case of *Carpenter vs. Allen*, 16 An. 435, was referred to and quoted from, and the rule announced reaffirmed, the court stating that since the *Carpenter-Allen* case the principle was recognized in a number of decisions, citing them.

The decisions rendered since the *Flathers* case, upon this point, are in accord with prior decisions, notably the cases of *Mrs. Ada Lester vs. Connelly, Sheriff*, 46 An. 340; *Thompson vs. Whitbeck*, 47 An. 49, 53.

The principle was announced, discussed and made the basis of the conclusion reached in *Hunter vs. Buckner*, 29 An. 604.

But it will surely not be inferred that the principle is so far-reaching and inflexible as at times to become a protection to sham deeds and simulated sales. It does not apply between the parties when invoked by a vendor as a protection from the pursuit of creditors,

and only becomes binding as to third persons who have acted in the utmost good faith in acquiring a right for a valid consideration.

We only here apply the familiar maxim that when one of the persons must suffer, the law inflicts the loss on the non-vigilant and inactive.

Had the intervenors, holders of these notes, purchased the property (instead of [the notes], in good faith; they would have acquired a valid title. The principle which would have sustained the sale applies to the transferees and holders of the notes secured by mortgage on the property and to the mortgage itself.

This brings us to the second proposition argued at the bar, that the action is in revocation of the sale and not the action *en declaration de simulation*, for the reason that, although simulation is alleged in the body of the petition, in the prayer the action is limited to plaintiff's right only, and it is sought by the prayer to have the title annulled to the extent only that it affects their, the plaintiff's, interest.

A similar question was submitted to this court for decision in *Hart & Co. vs. Bowie*, 34 An. 323, 326. Judged by the rule followed in the cited case the action here is revocatory in character.

As it is not a matter of controlling importance in reaching a conclusion, and as in either case, whether revocatory or *en simulation*, the result would be the same here, we pass to the next and last issue involved, the solvency of the co-debtor *in solido*. Reason and authority required that the creditor should have proven that it was not possible for him to recover the amount due him from either of the debtors *in solido* (because of the insolvency of both debtors or for some other preventing cause) before instituting suit to set aside a sale on the ground of simulation or fraudulent preference. In *Hart vs. Bowie*, 34 Ar. 323, the member of a commercial firm was sued to annul the sale as fraudulent or simulated. Her insolvency alone was alleged. The court held that the insolvency of the other members of her firm debtors *in solido*, should also have been alleged.

Each of the debtors is responsible for the amount, and without common insolvency the creditor is without authority to question the verity of their transactions. It is true that the creditor may sue, recover judgment and seize the property of either of his debtors *in solido*; it does not follow that he has the right to maintain an action to annul acts, when it is not at all made evident that such an action is necessary to the recovery of his claim.

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By express law the creditor has a right of action against all of his debtors bound *in solido* for the payment of the debt. No authority is to be found in support of any such right against one who has bought in good faith and without notice property from one of the debtors bound *in solido*, not insolvents.

In conclusion, we state the following controlling propositions:

1. If the creditor allows the property of his debtor to stand recorded in the name of another, by a title translatif of property, he puts it in the power of that other to put it beyond the reach of his claim by transferring the right, in regular course of business, to an innocent third person without notice.

2. The prayer of the petition controls the action; if the petitioner seeks to restrict his action to the recovery of his own claim the action is revocatory, and not *en declaration de simulation*.

3. Unless the solidary debtors are all insolvent no action will lie to set aside a fraudulent sale by a revocatory action.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed in so far as relates to the intervenors only.

The judgment appealed from is affirmed in so far as it decrees that Henry A Childs and James F. Martin *in solido* are condemned to pay the full sum of eight hundred dollars, with interest as set forth in the judgment; it is also affirmed in so far as right may be reserved by the following: "without passing upon the rights of intervenors to proceed against George M. Robertson and Henry A. Childs personally on the notes transferred by Childs to the intervenors." Save as affirmed by the foregoing, the judgment is annulled, avoided and reversed; as to costs in the lower court, judgment is affirmed, except in so far as the intervenors are concerned.

It is further ordered, adjudged and decreed that there is judgment for intervenors, Felix Loeb & Bros., and against the commercial firm of J. & L. Dreyfous and Henry A. Childs and George M. Robertson, decreeing the mortgage transferred with the notes held by intervenors, not simulated and fraudulent, in so far as the intervenors are concerned and maintaining their intervention.

Relative to costs, as to intervenors, in this court they are ordered to be paid by plaintiffs and appellees; in the District Court they are to be paid by plaintiffs and defendants as incurred by each or both.

Aiken vs. Widow Gatlin.

No. 12,112.

WILLIAM M. AIKEN VS. WIDOW MARY P. GATLIN.

An *ex parte* waiver of proof of a substantial fact, by the defendant tutor, from which it may be inferred that he consents to the judgment prayed for, against his ward, may *not* be considered by the District Court. It may require that *in lieu* proof be offered in open court (to sustain the proof waived) on an application to confirm a default.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Wall & Watt for Plaintiff, Appellant.

No appearance in Supreme Court for Defendant, Appellee.

Argued and submitted April 25, 1896.

Opinion handed down May 4, 1896.

The opinion of the court was delivered by

BREAUX, J. Plaintiff sued as sole legatee of the late Shepherd Brown, Mrs. Mary P. Gatlin, surviving spouse of James S. Gatlin, now wife of John P. Mangin.

The suit was brought against her individually and against her as tutrix and against her present husband, as co-tutor of the minor, James A. Gatlin, for lands, plaintiff alleged, was in their possession. The service was personal upon the defendants; they filed no appearance. On motion, regularly made, a default was entered of record.

In due time on the application to confirm the default, the judge of the District Court dismissed the suit and gave for reason: that the defendants failed to answer, but made affidavit individually and as representing the minor, to the effect that they are in possession of the land claimed, and that upon this and other evidence, it is proposed to confirm the judgment by default against them and their ward; that the judgment, if thus rendered, will be, substantially, a consent judgment against a minor, and as such, at variance with the letter and spirit of the law, and further, that the plaintiff who claims as universal legatee of Shepherd Brown has failed to offer or file the judgment under which he claims, and that he has not shown that the lands said to be swamp lands, ceded by the United States Govern-

Aiken vs. Widow Gatlin.

ment to the State, and by the latter sold to them, have ever been listed and approved to the State by the proper officers of the United States Government.

From the judgment, dismissing the suit, the plaintiff prosecutes this appeal.

The admission of the defendants that they were in possession of the land claimed, as alleged, was signed by them on the 16th day of December, 1895. It was offered as evidence on hearing for confirmation of default on January 10, 1896. The form of the admission, the fact admitted and the date, (being the day on which the papers were served), are, in effect, a consent, to a judgment, particularly when it is borne in mind that no objection whatever was interposed to the suit. A real right was involved, one which a tutor is not authorized under the law to waive, or in any manner gratuitously abandon. It has been said of the tutor in the matter of the abandonment of the right of a ward: *Qui non potest donare, non potest confiteri*. The tutor may make judicial avowals provided they are within the bounds of his authority, but he is without authority to confess judgment or to sign an acknowledgment in advance (without judicial sanction whatever) of a fact to be used in a suit against his ward.

The property of minors is administered under the direction of the courts through tutors who are their agents (particularly of the District Court), to whom they primarily owe an account of their gestion.

In confirming a default it is preferable, as a precedent, that the District Judge should have the opportunity to judge for himself; by the examination in his presence of witnesses who testify in support of material facts, or after an examination of witnesses contradictorily with the opposing party.

It is a question of practice of no great significance, possibly, in this case, and which called for no explanation from the worthy counsel, who acted in the utmost good faith and violated no rule of propriety in accepting the admission tendered.

We feel constrained solely on the ground we have stated to agree with the District Court. We think when minors are concerned, it is decidedly advisable to avoid even the appearance of an *ex parte* consent. With reference to the evidence on other points we deem it unnecessary, at this time, to express an opinion.

It is therefore ordered and decreed that the judgment appealed from is affirmed.

Hoyle et al. vs. Southern Athletic Club.

No. 11,944.

J. M. HOYLE ET AL. VS. SOUTHERN ATHLETIC CLUB.

When the requirements of the statute providing for notices to delinquent taxpayers are carried out, it would not follow that the notices were ineffectual because they did not reach the parties for whom intended. Citations properly made at domicile are well made, though not handed to the person intended to be served.

When property is assessed in the name of an "Estate of J. M. Hoyle," a notice addressed by the tax collector to the "Estate of J. M. Hoyle," placed and prepaid in the postoffice, is not a compliance by the tax collector with the requirements of law.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Frank L. Richardson and Kernan & Wall for Plaintiffs, Appellees.

J. Zach. Spearing, J. J. McLoughlin and Lloyd Posey for Defendants, Appellants.

Argued and submitted March 11, 1896.

Opinion handed down April 6, 1896.

Rehearing refused May 18, 1896.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiffs' action is petitory. Their petition refers to certain tax sales as those under which defendant claimed to hold, but they are referred to as absolute nullities and are asked to be so decreed. Defendants' possession is admitted.

The tax sales which defendants set up as those under which they assert ownership are declared by plaintiffs to be absolutely null on two grounds:

1. Because the property was improperly assessed and sold as a half and as a third of certain squares instead of an undivided half and an undivided third of those squares.

2. Because no notice was given in the tax proceedings to the succession of J. M. Hoyle or to the heirs of J. M. and Rebecca Hoyle, as required by Art. 210 of the Constitution. The deeds of sale are on printed forms prepared in advance to apply to all sales which might be made in tax proceedings in the First District of New Or-

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48	987
48	879
50	41
50	964
50	966

48	879
52	1964
52	1965

48	879
104	814

48	879
108	234

48	879
110	290
110	291

48	879
d118	593

Hoyle et al. vs. Southern Athletic Club.

leans. These forms contain blanks intended to be filled up so as to make each particular form, when used, made to apply to some special case which had arisen. After the usual recitals of acts of sale stating the appearance of the parties before the notary and the capacities in which they appeared, one of the deeds to the State proceeds to say that the deputy State tax collector of the First District of New Orleans declared "that acting by virtue of the power vested in him by Act No. 77 of the Legislature of 1880, the tax or assessment rolls of the parish of Orleans on real estate were duly filed and recorded in the mortgage office of the parish and with him, the tax collector; that as soon as the said rolls were thus filed he, the said tax collector, published a notice once a week for two weeks in a paper published in the parish of Orleans, setting forth in substance that the taxes assessed on real estate in the said parish in the year 1881 are set forth in said tax rolls on file in said tax collector's office and in the said mortgage office; that the said taxes are due and would become delinquent on December 31, 1881; that the same will draw interest from said December 31, 1881 (we insert the dates as mentioned in one of the deeds so as to make the description of the acts clearer), until paid or sold in accordance with Act 210 of the Constitution. * * * And the said tax collector further declared that as soon after the second day of January, 188—, as possible he addressed to each taxpayer who had not paid his or her taxes on immovable property for said year 1881 a written or printed notice, setting forth in substance that the State and city taxes assessed to and against said taxpayer on immovable property in said parish (stating in said notice the assessed value of each specific piece of said property and the taxes due thereon) fell due the day the tax rolls were filed in the mortgage office, stating the date of such filing, and that the same should have been paid in full on or before the first of the month succeeding said filing; that said taxpayers became delinquent for said taxes on the first day of said month; that the said taxes will bear interest at the rate of eight per cent. per annum after December 31, 1881, until paid in full; that after the expiration of twenty days from the date of said notices he, the tax collector, will advertise for sale each specific piece of immovable property on which said taxes are due in the manner and form provided for judicial sales; that at the principal front door of the Civil District Court of said parish he will sell within the legal

hours for judicial sales, for cash and without appraisement, such portion of each specific piece of property as the debtor shall point out, and that in case the taxpayer will not point out sufficient property he, the said tax collector, will at once sell for cash and without appraisement the least quantity of said specific property which any bidder will buy for the amount of said taxes, interest and costs.

And the said tax collector further declared that he delivered to each taxpayer in person or left at his residence or place of business or mailed to him by registered letter, postage prepaid, addressed to the post office of said taxpayer; one of the foregoing mentioned notices " * * * *

The act goes on to recite the fact of the publication in a newspaper in New Orleans of a general notice, substantially of the same form, addressed to all known and unknown owners of immovable property in said district, which is described on the tax rolls; "that at the expiration of twenty days, counting from the day the last of said notices were delivered, mailed, published or posted, the tax collector proceeded to advertise for sale in two newspapers mentioned in the manner provided for judicial advertisements and in the form prescribed by law (and after having complied with all the other requisites of law), all the immovable property on which said taxes were due, being the properties hereinafter described to enforce the payment of State taxes due on same for the year 1881, the said properties being advertised in the names of person or persons on which each piece was respectively assessed. That after said publication * * each piece was separately offered for sale to enforce the payment of said taxes due on same * * that after repeated offerings and after a strict compliance with all other requirements of law, the same, together with all improvements thereon, were each separately bid in for and adjudicated to the State by said tax collector, no one having offered to pay said tax or bid on said property at all or any portion thereof, which said properties so adjudicated are hereinafter separately described. "Immediately following each description" (so the deed declares) "is the name of the person or persons in whose name the said property was assessed for the said year 1881, together with the total amount for which said properties were respectively offered and for which in default of any bid or any offer to pay each specific piece of property hereinafter described was respectively and separately adjudicated to the State" * * *

Hoyle et al. vs. Southern Athletic Club.

Below followed the description of one of the properties claimed by the defendant in this suit—that described as one-half of square No. 888 as above stated. Immediately following the description is the recital “which said property was duly and legally assessed for 188— and advertised in the name of Est. J. M. Hoyle.

“Total amount for which above property was adjudicated to the State, including taxes of 1881, interest on same to date of adjudication, costs, fees, commission, advertisement, etc., eleven and 65-100 dollars. * * * And in pursuance of said adjudication and by virtue of the provisions of said Act No. 77 of 1880, and the law for such cases provided, the said tax collector, and in the name and on behalf of the State of Louisiana, does by these presents, grant, bargain, sell, assign, transfer, set over and deliver unto the State of Louisiana the property hereinbefore described, with the right to be put into actual possession thereof by order of any court of competent jurisdiction.”

The recitals in the deed for the second piece of property were substantially the same as those just given; the act under which the tax collector declared he was proceeding being Act No. 96 of 1882.

The recital as to the first notice sent out after the filing of the tax rolls in the Recorder's office was a general statement that after the second day of January, 188—, he addressed and mailed to each taxpayer who had not paid his or her taxes, for said year 1882, a notice setting forth in substance that the State taxes assessed to and against said taxpayer for said year 1882 on immovable property in said parish (stating in said notice the property assessed and the assessed value of said property and taxes due thereon) were then due; that the rolls had been filed in the mortgage office; that said taxes must be paid within twenty days after the mailing of said notices; that after the expiration of twenty days from the date of the mailing the property would be advertised, etc. This is followed by a recital that “one of said notices, correct in form and substance, was duly and legally mailed to the delinquent taxpayer hereinafter named.”

The only mention made of the name of Hoyle in either deed is to be found in that portion in which it is declared that the properties were assessed in the name of “Est. of J. M. Hoyle.”

W. D. Hoyle, one of the sons of J. M. Hoyle, and who was appointed tutor of his minor brothers and sisters, was twice placed upon the stand as a witness to prove that he had never, either indi-

vidually or as tutor, received the notices referred to in the deeds of the tax collector. When first on the stand his statement was simply that he had no recollection of having received the notices. On his second examination he stated that since his first examination he had refreshed his memory and he was then certain he had not done so. While the reasons which he assigns as those which had caused him to become fixed in his opinion did not, we think, furnish a very satisfactory basis for him to have done so, none the less the case comes to us with a positive denial on his part, to which the District Judge, who saw and heard the witness, gave credit. The different heirs who have become of age were also placed on the stand and each made as to himself and herself a similar denial.

We do not think this testimony by itself would conclusively settle the question of notice as entering as a factor in determining the legality of the tax sales. It might well be that in point of fact no notices were actually received by any of the parties and yet the sales could stand, for if the assessments were properly made and the tax collector in giving the notices conformed to the requirements of the statute and of the law, it would not follow that they would be ineffectual because they did not reach the parties they were intended to reach. It frequently happens that citations made through service at the domicile are mislaid or are not handed to the person to be cited—none the less the citations are well made. Again, in matters of notice of dishonor of notes, if the requirements of a statute be followed as to the time, place and mode of service, as for instance by placing a letter properly addressed and prepaid in the postoffice within the time fixed by law, it has been held that it is not necessary to prove that the letter was received and that miscarriage would not prejudice the party giving notice (see Woods Byles on Bills, p. 282, Eighth Edition). We are, therefore, to inquire whether there be evidence before us going to show that notice was properly sent. It will be noticed, as we have said, that in neither of the deeds is the name of Hoyle mentioned in any place other than that where the property is referred to as having been assessed "Est. of J. M. Hoyle." It is nowhere intimated that the tax collector knew or had taken any trouble to ascertain who the administrator or representatives of J. M. Hoyle were. There is no direct averment or recital that the Estate of Hoyle was delinquent for the taxes for the year in which the prop-

Hoyle et al. vs. Southern Athletic Club.

erty was sold; that fact is only reached inferentially and there is no attempt by the tax collector to come down to particulars in reference to notices. There is a general sweeping recital that notices to all delinquent taxpayers on the rolls were given, but there is no special mention of any particular person or persons having been notified and no attempt to show to whom any particular mailed notice was addressed. Acting on mere presumptions as we have to do, we would have to assume that the notices were placed in the postoffice, addressed to "Est. of J. M. Hoyle" that is, the tax collector, in giving the notice, followed the assessment. Would such a notice so sent fulfil the requirements of the law? As a matter of course, on the face of the papers, the collector was advised he had to deal with a succession. The assessment roll itself disclosed that fact to him.

Under Sec. 35 of Act No. 77 of 1880, the tax collector was directed to either deliver a notice to each taxpayer in person or to leave one at his residence, or to mail him one by registered letter, postage prepaid, addressed to the postoffice of said taxpayer.

Under Sec. 50 of Act No. 98 of 1882, the tax collector was directed to either deliver a notice to each taxpayer in person or to leave one at his residence or place of business, or to mail him notice by postal card, addressed to the postoffice of said taxpayer.

Was a letter addressed to "Estate of J. M. Hoyle," and placed prepaid in the postoffice, a fair and reasonable compliance by the tax collector with the requirements of law. Article 210 of the Constitution, in requiring that notice should be given to the taxpayer, evidently contemplated that reasonably diligent steps should be taken to make the notice effectual. It has always been recognized that a strict observance of the formalities called for by the law is exacted in matters of tax sales—a stricter observance in fact than in almost any forced proceeding under and through which ownership of property is made to shift. In view of this fact we have examined authorities, bearing upon the mode of addressing notices in matters other than tax proceedings. In matters of the notice of bills we find that it was held in *Massachusetts Bank vs. Oliver*, 10 Cush. (Mass.) 557, that a notice of dishonor addressed "to the estate" of the deceased endorser without inquiry shows lack of diligence, and is therefore bad. In *Christmas vs. Fluker*, 7 Rob. 13, a notice "to the legal representatives" of a deceased en-

dorser was pronounced insufficient. In that case the heirs had been placed in possession of the succession before the maturity of the note.

In the present case the heirs (with the exception of one who was tutor of the others) were all minors, who under the law itself were made to accept the succession of their father and mother under benefit of inventory. There is no evidence of their having been recognized as heirs or placed in possession.

In *Louisiana State Bank vs. Dumartrait*, 4 An. 483, it was held that where the death of an endorser was known and his succession was represented by an executor, notice should be sent to him and a letter addressed to the deceased was bad.

In *Maspero vs. Pedesclaux*, 22 An. 227, this court held that a notice of dishonor, though addressed to a deceased endorser, would hold the heirs if it could be shown as an actual fact that they had received the notice. In the case at bar, the parties swear they did not receive the notice.

In *City of New Orleans vs. Heirs of Schmidt*, 10 An. 771, it was held that an advertisement (to effect notice) in the name of the "Heirs of Schmidt" was insufficient on account of vagueness. To the same effect is *City vs. Heirs of St. Romes*, 28 An. 17. In *City vs. Estate of Samuel Stewart*, 28 An. 180, the executrix of the succession of Stewart appealed from a judgment against "the estate of Samuel Stewart" for taxes due the city of New Orleans, on the ground that the citation (by publication) was not sufficient, because an estate was a thing and not a person. The judgment below was affirmed. In *City vs. Ferguson*, 28 An. 240, defendant pleaded that the assesment or publication was improperly made in the name of Mrs. J. A. Ferguson simply, and the words "Estate of" were not added as they should have been, seeing that the assessment was made after her decease. The court in reply said that the object in giving the name at all was obvious, the sole purpose being to describe or identify the property taxed and the tax assessed by the use of the name of Mrs. J. A. Ferguson, which would have been sufficient, if she were still living—that after her decease the word "Estate" would no more clearly indicate that the property taxed was that known as Mrs. Ferguson's.

In *Irvin vs. City*, 28 An. 670, publication was made in the name of Richard Murphy, who had been dead for several years. Judgment by default was confirmed on this publication as a citation. An in-

Wadsworth vs. City.

junction issued against a sale of the property on behalf of a minor, Richard Murphy, who acquired the property from Richard Murphy, having been set aside by the District Court, this judgment was affirmed on appeal. MR. JUSTICE WYLY dissenting.

It will be noticed that in these cases the parties in interest came forward and contested prior to a sale of their property, showing they were fully advised of the claims set up against it.

After consideration of this case we have reached the conclusion that the adjudication to the State must be held to have conveyed no title to it for want of proper notice. The State having no title conveyed none to the defendant.

The judgment appealed from is affirmed.

No. 11,999.

W. R. WADSWORTH VS. THE CITY OF NEW ORLEANS.

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51 1151
51 1871

The court again affirms the conditions of transfers of claims against the city of New Orleans for payment out of budgeted appropriations, prescribed by previous decisions. 42 An. 164; 48 An. 78; 46 An. 545.

Creditors of the city claiming payment under appropriations of an amended budget have no exclusive rights of payment from the revenues placed on such budget. Acts 1877, Extra Session, No. 80, Sec. 3; Act No. 20 of 1882, Sec. 66; Act No. 88 of 1884; No. 109 of 1886; 86 An. 238.

The court again affirms that the items on the original budget have the right of priority of payment over creditors claiming under the original budget. *Ibid.*

And it is again affirmed that the parties seeking payment from budgeted appropriations are restricted to such appropriations, and have no action against the city until there are funds to the credit of such appropriations. 46 An. 545, and cases there cited.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

Louque & Pomés for Plaintiff, Appellant.

E. A. O'Sullivan, City Attorney, *Henry Renshaw* and *Horace L. Dufour*, Assistant City Attorneys, for Defendant, Appellee.

Argued and submitted April 7, 1896.

Opinion handed down May 4, 1896.

Wadsworth vs. City.

The opinion of the court was delivered by

MILLER, J. The plaintiff appeals from the judgment dismissing his suit to recover on certificates of appropriation issued by the city for wages of laborers, and on claims alleged to have been acquired by plaintiff against the city.

The defences are that the plaintiff has not proved ownership of the certificates or claims; that if that proof is deemed administered the claims and certificates are payable only out of the revenues of the year in which the claims accrued, or for which the certificates issued, and, finally, that there are no funds from which the plaintiff can demand payment.

In previous decisions we have maintained that in order to acquire rights against the city for amounts due for wages of laborers, or to other parties specified in the ordinances or carried on the pay rolls, the receipt of the original creditor for the certificate or his signature to the transfer of his claim must be furnished to the city. This is a rule of protection to the city, and is, in terms, exacted by the ordinance under which the certificates sued on were issued. *Neugass vs. City of New Orleans*, 42 An. 164; *Wadsworth vs. City*, 46 An. 445; *Neugass vs. City*, 48 An. 78. In this respect we do not perceive that this record is materially different from that before us on the plaintiff's previous appeal. The plaintiff has produced testimony that the claims mainly, if not all for laborers' wages, were acquired from them by plaintiff's transferee, but as we appreciate the testimony, none of these laborers have placed their names on transfers on the books of the city or on transfers on file in the proper department of the city government. Nor is the case different in respect to the certificates. We gather from the record that the orders or transfers from the primary creditor of the city were brought to a broker, who furnished money on the faith of their orders, and who obtained the certificates, with no acquittance or receipt to the city from the original creditor or without even leaving on file with the comptroller or other officer the order or transfer of the creditor. This method of business, if recognized, would, in our view, expose the city to loss and be a departure from the mode implied, if not expressed, by the charter, and our decisions. But on this issue of ownership, we think it proper to reserve plaintiff's rights. We do this the more readily, because, in our view, he has no right to present payment,

Wadsworth vs. City.

and on another trial he may supply the testimony deemed essential on the issue of ownership. Here we might close the opinion, but to guard against the renewal of useless litigation, we think it proper to again express our views as to the right of action of creditors of the city claiming payment from budget appropriations.

The petition not only asserts the right of payment out of the revenues of 1882, but claims an absolute judgment for the amount of the claims and certificates. We think our jurisprudence, based on express legislation, is that claims of the character, whatever their form, are restricted for payment to the revenues of the year in which the claims accrued or certificates were issued. Act 1877, Extra Session, No. 80; City Charter, Act No. 20 of 1882, Sec. 66; No. 88 of 1884; 109 of 1886; Barber Co. vs. City, 48 An. 464.

Another contention of plaintiff is, that as his claims are based on the appropriations in the amended budget of the city of 1882, he is entitled to payment from the revenues placed on that budget, of which he claims there is a sufficiency to pay him. It appears that the city has on hand of these revenues of 1882, six thousand five hundred dollars, but thirty-four thousand dollars of the items on the original budget of that year are unpaid. The revenues on the amended budget were the anticipated excess of the appropriations on the original budget, and estimated income of the year from other sources. The plaintiff's theory is: two budgets and two classes of creditors of the same year, corresponding with the budgets. If this classification of separate creditors and separate budgets is to be introduced, it would, in our view, be in marked contrast with the simplicity and economy proposed to be secured in the financial administration by our law in providing for one annual budget with suitable provision, not to be exceeded for all creditors of the city entitled to payment from the budget appropriations. (Authorities cited above.) The contests in the courts of transferees of claims against the city and holders of city certificates competing for payment from budgeted appropriations, under laws designed to secure economy and an orderly administration of the city finances, have imposed huge expenses wholly extraneous to the legitimate purposes of municipal government. The litigation of the city would in our view, be largely increased by the classification of creditors and of assets for their payment, we are asked to recognize in this case. We can find no warrant in our law to give parties claiming to be paid from appropriations on the amended

Wadsworth vs. City.

budget, any exclusive or special rights on the revenues placed on that budget. Our predecessors held that amended budgets were permissible, but that the items on the original budget were to be first paid, and hence the payment of any appropriation on the amended budget was enjoined until payment of the expenditure provided for on the original budget. That obstacle to plaintiff confronts him. In that case the injunction sought was by parties holding claims under the original budget to restrain payment to those whose rights were based on the amended budget. The case necessarily involved the question presented here, in respect to the application of the supposed surplus of the appropriations. The principle of the decision extends as well, we think, to sources of income not brought on the original budget. The budget, as first framed, was entitled to be first paid, is the leading idea of the decision; and all the annual revenues are pledged for the purpose. *Shotwell vs. The City*, 36 An. 938, and especially top paragraph on page 940. The decision, it is said, is not binding, except as between the parties. To give effect to plaintiff's pretensions would be to disturb that effect. Irrespective of that, we adopt the principle there laid down. The *Shotwell* decree was in the interest of private parties. In the public interest requiring one budget and forbidding an amended budget conferring special rights on those claiming under it, in our opinion, the pretensions of the plaintiff must be rejected.

We have held and again hold that parties like plaintiff have no action against the city unless there are funds to the credit of the appropriations out of which they are entitled to be paid. The record shows no such fund. 46 An. 345 and cases there cited.

We gather from the record that the revenues claimed to be exclusively applicable to the items on the amended budget, as well as those on the original budget, have been applied to no other purpose than as directed in the *Shotwell* decision; that is, to the appropriations on the first budget. This answers, we think, the contentions that the city is liable because of an alleged diversion of funds. The argument for plaintiff, in this respect, simply is another form of assertion of exclusive rights on the revenues brought on the amended budget.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be annulled and reversed, and that there be judgment now rendered against plaintiff as in case of *non suit*—costs to be paid by him.

 Billgery et als. vs. Land Trust of Indianapolis.

No. 12,085.

J. M. BILLGERY ET ALS. VS. LAND TRUST OF INDIANAPOLIS.

An adjudication of real estate at a public judicial sale, made under and in pursuance of the provisions of Act 82 of 1884, is bound to pay all the taxes due thereon at the time of sale, and which were theretofore assessed under current revenue laws since 1880, and which he had assumed and was legally bound to assume as a part of the purchase price thereof.

But in the absence of any pertinent decision of this court to the contrary at the time such adjudication was made, it was competent for the Circuit Court of the United States, holding sessions in the State of Louisiana and having jurisdiction *in personam* of one of the parties to a litigation involving such an adjudication, to place such interpretation upon the provisions of said legislative act as in its judgment was thought to be legal and just.

And such judgment will be held binding by this court between the parties thereto and their vendees and assigns, notwithstanding it has, in other cases since, put a somewhat different interpretation upon that statute.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Frank L. Richardson and William Winans Wall for Plaintiffs, Appellants.

E. Howard McCaleb for Defendant, Appellee.

Argued and submitted March 26, 1896.

Opinion handed down April 20, 1896.

Rehearing refused May 18, 1896.

The opinion of the court was delivered by

WATKINS, J. The object of this suit is the annulment and revocation of a tax sale of certain described improved real estate, situated in New Orleans, of which the plaintiffs claim to have derived title by inheritance from Joseph and Margaret Billgery, their deceased father and mother, and their averment is, that they acquired same at sheriff's sale at the suit of the city of New Orleans against one Lacroix on the 30th of September, 1874, as evidenced by a sheriff's *proces verbal*, duly recorded in the conveyance office.

Petitioners aver that the defendant sets up a claim of ownership to said property, through and by virtue of a tax sale made to Domingo Negrotto, who conveyed same to the Western Land and Em-

48	890
48	901
49	355

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4104	718

48	890
111	558

igration Company, from whom defendant claims to have derived title.

That Negrotto became adjudicatee thereof at a judicial sale made by the tax collector in the year 1888, under and by virtue of the authority of Act 82 of 1884; but that same was absolutely null and void, because the tax collector was without authority to execute a deed to him until he had complied with the essential condition precedent of that statute, to-wit: "the payment of all taxes due both city and State upon said property subsequent to the year 1880," which he and his vendees had failed to do, thus producing a cloud upon their title.

They then aver that since the aforesaid adjudication to Negrotto, they have obtained a certificate of redemption from the auditor, having paid all of the taxes which had been assessed against said property since 1880, prior to the aforesaid adjudication; and that, in consequence of said payment of taxes, and redemption thereof from the auditor, their ancient title by inheritance had revived and become established.

The prayer of their petition is, that there be "judgment restraining defendant from further slandering petitioner's title by setting up any claims of ownership; decreeing their alleged title null and void; and erasing and canceling the same from the records of the conveyance office."

For answer the defendant pleads a general denial and specially denies that plaintiffs are the owners and possessors of the property; and assuming the character of plaintiffs in reconvention, it alleges full and complete ownership thereof, "having acquired same from the Western Land and Emigration Company, which company purchased from Domingo Negrotto, who acquired the same at tax sale made by the State tax collector, under provisions of Act 82 of 1884.

"That all the taxes subsequent to the year 1880, both city and State, due and owing on the said property and assumed by the purchaser, were paid. That the certificates of redemption referred to in the plaintiffs' petition were issued after the payment of said taxes, assumed and due by the purchaser at said sale, and in violation of a judgment and decree of the United States Circuit Court, rendered in the case of Western Land and Emigration Company vs. George Guinault, O. Harrison Parker and Isaac L. Patton, State Tax Collec-

Billgery et als. vs. Land Trust of Indianapolis.

tors, No. U. S. Circuit Court, which decree is binding upon the State; and appearer pleads the same as *res judicata*."

The defendant further pleads the prescription of three and five years in bar of plaintiffs' demand.

The prayer is for judgment rejecting the plaintiffs' demand, and for judgment upon its reconventional demand decreeing it to be the true and lawful owner of the property, and maintained and quieted in the possession thereof.

The parties agreed upon a statement of facts upon which the case was submitted; and upon the trial thereof there was judgment pronounced in favor of the defendant, and the plaintiffs have appealed.

From the statement of facts we find that the admissions conform to the allegations of the petition and answer, and the transcript otherwise discloses that the heirs of Billgery paid into the State treasury the amount of the taxes of 1880, 1881, 1882 and 1883 which had been assessed against the property in dispute, and obtained the auditor's certificates of redemption therefor, bearing date May 18, 1884.

That on the 23d of August, 1886, said property was, by the tax collector, adjudicated to Domingo Negrotto, under and in pursuance of the terms and provisions of Act 82 of 1884, in the forced collection of the taxes assessed against the same for the years 1875, 1876, 1877 and 1888, and remaining unpaid; and upon 15th of December, 1888, the tax collector executed an act of sale therefor in favor of the Western Land and Emigration Company as the assignee of Negrotto, which was registered in the book of conveyances immediately afterward.

That the act of sale, amongst other things, declares that, as part of the purchase price, "the said purchaser hereby assumes and promises to pay all the State, city, parish and municipal taxes on said property for the year 1880 and subsequent years, together with all interest, penalties, costs, charges, fees and commissions which may be due and not paid."

That the certificate of the tax collector bearing date January 10 1894, shows that the taxes which were assessed against this property in years prior to 1879 were paid and satisfied by the act of sale above described; and those for the years 1880, 1881, 1882 and 1884, aggregating five dollars, were satisfied by the heirs of Billgery, and form the basis of the auditor's certificate of redemption; all other

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taxes having been paid by the defendant and its predecessors in title.

That this property was adjudicated to the State by the tax collector on the 29th of November, 1895, in satisfaction of delinquent taxes of 1893, and the title was duly recorded soon afterward.

It appears from the transcript of the cause, which is in evidence, that on the 31st of December, 1888—immediately after its acquisition of the property—the purchaser instituted a suit in the Circuit Court of the United States, entitled *The Western Land and Emigration Company vs. George Guinault et als.*, bearing docket No. 11,764, the object and purport of which, in so far as it has a bearing upon the issues in this suit, may be summarized as follows, viz.:

That the taxes, tax mortgages, and the tax privileges in favor of the State of Louisiana and the city of New Orleans for the years 1880, 1881, 1882 and 1883, were extinguished by the prescription of three and five years; and “that the time for the acquisition of said prescription had elapsed and run out before it became the owner of said properties,” including the property in suit.

That the complainant had paid all the State and city taxes due upon said properties which had been assessed against it for the years 1884, 1885, 1886, 1887 and 1888, in the name of the estate of Billgery, being the five years previous to the adjudication to Negrotto under Act 82 of 1884.

That complainant had demanded of the Recorder of Mortgages the cancellation and erasure of the inscription of said tax liens and mortgages for the years specified without avail; and, on that account, he averred that same had the effect of casting a cloud upon his title which should be removed therefrom.

That the city officers who are charged by law with the collection of city taxes, and the State tax collector for the district in which said property is situated, pretend and assert that said taxes are still due and owing, and threaten to advertise for sale, and sell said property for the payment thereof, if same are not immediately paid, notwithstanding same have been extinguished by prescription.

That complainant prayed for and obtained an injunction against each one and all of said officers, restraining and prohibiting any such advertisement or sale as contemplated, and for an appropriate decree perpetuating same, and commanding the recorder to cancel

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said interfering inscriptions for the grounds and reasons therein stated.

That on final hearing of complainant's bill the injunction was perpetuated, and the tax collectors enjoined from any further proceeding looking to the collection of said taxes of 1880, 1881, 1882 and 1883, on the ground and for the reason that same were prescribed; and it also was decreed that the Recorder of Mortgages should cancel and erase from the books of his office the aforesaid tax inscriptions against said property.

On this state of facts we have distinctly raised the question of law, whether or not the defendant's title is shielded and protected by that judgment and decree, from the demands and pretensions of the plaintiffs under their auditor's certificate of redemption, procured five years thereafter and founded upon a payment of the identical taxes which it decreed to have been prescribed at the time of Negrotto's acquisition under Act 82 of 1884.

The Circuit Court in said cause decided "that the meaning of Sec. 5 of Act 82 of 1884 is, that the property sold at tax sale should pass to the purchaser subject to such liens for unpaid taxes as could have been enforced against the same in the hands of the former owner in case there had been no sale; and that it was not the intention of the legislation in said act to revive against property sold for taxes any lien that had already ceased to exist thereon."

That decree was rendered in March 1889—more than one year prior to the decision of the case of *State ex rel. Martinez vs. Tax Collector*, 42 An. 677, which was decided in May 1890. *Western Land and Emigration Company vs. Guinault, Recorder*, 38 Federal Reporter, 287.

Consequently, anything that was said in the Martinez case could not be given any *retrospective* effect, and control the decision of the Circuit Court in the case of the land and immigration company.

The law of this State applicable to tax inscriptions, as interpreted by this court *immediately previous* to the decision of the Circuit Court, was, that they were prescriptible by the lapse of three years, under the statute of 1877. *Succession of Stewart*, 41 An. 127.

That decision involved taxes and tax inscriptions of 1880, 1881, 1882 and 1883, just as the decision of the Circuit Court did—and it was rendered in the month of February, 1889, just one month prior

to the Circuit Court decree, and it was, therefore, a precedent for that court, in rendering its decree.

This case differs essentially from that of *Remick vs. Lang*, 47 An. 914, in that in the adjudication therein, the purchaser assumed and promised to pay the taxes for the years 1880, 1881, 1882, 1883 and 1884, as part of the purchase price; and he subsequently defaulted in paying the taxes subsequently assessed for the years 1885, 1886, 1887, 1888, 1889, 1890, 1891 and 1893; the plaintiff, as original owner, making payment of them all in 1893 and procuring a certificate of redemption from the auditor reinstating his primordial title.

On the contrary, the Western Land and Emigration Company filed the aforesaid suit for the cancellation and erasure of the taxes of 1880, 1881, 1882 and 1883, and procured a decree of the Circuit Court adjudging said taxes to have been prescribed at the time the tax sale was made; and said company, at once, paid all the remaining taxes for the years 1884, 1885, 1886, 1887 and 1888—the adjudication under Act 82 of 1884 taking place in December of 1888—and it caused the property to be thereafter assessed in its name and paid annually the taxes thereon assessed.

The property was in this situation in 1894, when the plaintiffs, assuming the Circuit Court decree to have been absolutely void, paid to the State treasurer, voluntarily, the taxes it had adjudged to be prescribed, and upon presentation of his receipt to the auditor, he issued a certificate of redemption to them—said taxes being one dollar for 1880, one dollar for 1882, and one dollar and one-half for the years 1883 and 1884, that is to say, *five dollars in all*.

And this was done in the face of the fact that the Circuit Court had jurisdiction of that suit *ratione personæ*, by reason the complainant being domiciled in and a citizen of another State than Louisiana; and of the fact that the complainant had subsequently sold and conveyed, by a duly recorded title, the property in controversy to a citizen of another State—being herein represented by a curator *ad hoc*—who had made its purchase upon the faith of the decree of the Circuit Court and prior decisions of this court interpreting the tax statutes of this State applicable thereto.

Section 84 of Act 98 of 1886 provides that “all taxes, tax mortgages and tax privileges shall be prescribed by three years from the date of filing the tax rolls,” etc.

That statute applies to the taxes under consideration here, the

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payment of which Negrotto assumed as a part of the price he was to pay, and from the effect of which his vendee was relieved by the decree of the Circuit Court; and the decree of that court finds an exact parallel in the case of *State ex rel. Powers vs. Recorder*, 45 An. 566, in which this court said in passing upon a similar question:

"Consequently, we find that the inscriptions of liens or mortgages securing city taxes against the property for and during the years 1877 to 1886, inclusive, should be canceled and erased from the mortgage records of the parish"—notwithstanding the relator had assumed the payment of all the taxes assessed against the property as part of the price of his acquisition from the State, through the auditor's deed of sale.

But it is argued on the part of plaintiffs that the Circuit Court had no jurisdiction as to the State, as she could not be sued without her consent previously obtained; and that the tax collector did not have the capacity to represent her in the premises.

In so far as the capacity of the tax collector is concerned there can be no serious question, because he was attempting to collect those taxes by seizure and sale of the property in dispute when he was met by the complainant's injunction issued out of the Circuit Court.

Possessing a duly recorded title thereto, the company was certainly entitled to thus restrain his further proceeding, charging, as it believed, and as that court subsequently decided, that the taxes of the years which have been particularly mentioned were in fact prescribed.

But it is insisted that the complainant's title was, to a certain extent, involved, and *quoad hoc* the State could not be represented by the tax collector. This is not correct. The complainant's title was not involved, except incidentally; and in *Smith vs. City*, 43 An. 727, this court entertained and decided a question of title, contradictorily with the tax collector alone.

It is further insisted that the judgment of the Circuit Court was not binding on the plaintiffs, because they were not cited.

They were not necessary parties because the action did not involve their title; and, further, because, at the time of the institution of the suit in 1888, their title had been completely divested by the adjudication to Negrotto first, and to the complainant afterward; and the

title evidenced by the auditor's certificate of redemption was not acquired until 1896—just eight years afterward.

On the whole, it is evident that the Circuit Court had jurisdiction in *personam* and that necessarily attracted to it jurisdiction *ratione materiæ* of the question under consideration, the property being only incidentally affected, and the defendants being within its jurisdiction territorially.

The complainants in the Circuit Court and the "Heirs of Billgery in this court represent the same cause of action—the taxes of 1880, 1881, 1882, 1883, which were assessed against the property in dispute, the contention of the former having been that same were prescribed at the date of the adjudication under Act 82 of 1884, and, consequently, formed no part of the purchase price which Negrotto agreed to pay; and the contention of the plaintiffs is that those taxes were not prescribed and were never paid by Negrotto, but have been paid by them and serve as the foundation of their present title by redemption.

Is not the thing demanded in each case identically the same? The claim set up in the former suit by the tax collector is the same that plaintiffs set up in this; the demand of the complainant in the former suit is the same that the defendant is asserting in this.

The demand asserted in each suit is "founded upon the same cause of action."

The demand is "between the same parties and formed by them against each other in the same quality." R. C. C. 2286.

And that article of the Code declares that, when these conditions coexist, "the authority of the thing adjudged takes place with respect to what was the object of the judgment."

And the following article declares that in such case a "legal presumption dispenses with all other proof in favor of him for whom it exists." R. C. C. 2287.

That the demand is formed between the same parties is fully evidenced by the fact that the property in controversy was *adjudicated to the State in November, 1895, for the alleged delinquent taxes of 1883—* which are among those which the Circuit Court decreed to have been prescribed—and in January, 1896, plaintiffs volunteered to pay same to the State Treasurer, and thereafter procured the auditor's certificate of redemption therefor—less than two months having intervened.

This suit is intended and expected to accomplish through the in-

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strumentality of that redemption the revocation of the defendant's title, on the sole ground that the decree of the Circuit Court is not binding and effectual with respect to them or their title of redemption; for upon the maintenance of that contention alone, confessedly depends the applicability of the principles announced in *Remick vs. Lang*.

It is quite evident from the foregoing statement that as the State never had any title to the property in suit until November, 1895, —near ten years after same had been adjudicated to *Negrotto*— and only held title for little more than one month when the plaintiffs obtained a certificate of redemption, that the title of the State is but an inconsequential factor in this controversy; therefore, we have neither quoted from nor analyzed the following authorities which are referred to in plaintiffs' brief. *Carr vs. United States*, 98 U. S. 433; *United States vs. Lee*, 106 U. S. 222; *The Siren*, 7 Wallace, 152; *The Davis*, 10 Wallace, 15.

As in this case it appears that there was no decision of this court defining what legal effect and interpretation was to be given to such an assumption as that which the provisions of Act 82 of 1884 required of a purchaser thereunder, at the date of the decree of the Circuit Court, it is quite clear that that court rightly decided it with the lights it had on the subject. It was bound necessarily to act upon its own judgment and adopt its own interpretation of the law applicable to the case; notwithstanding this court might subsequently take a different view of the question.

But the judgment of the Circuit Court is binding upon the parties before it in that suit and their vendees and assigns; and it must be respected and upheld as the law of that case, and of the subject matter of that litigation.

In *Burgess vs. Seligman*, 107 U. S. 20, the Supreme Court of the United States laid down briefly the rules defining the extent to which the Federal courts are bound by the State decisions, as follows:

"The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary

administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative decisions of what the law is. But where the law has not been thus settled it is the right and duty of the Federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean toward an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunal, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication." The American Law Register and Review, 186.

Accepting that statement as the settled jurisprudence of the Supreme Court on the question, as did the judge of the lower court, we concur in his finding.

Judgment affirmed.

Hoyle et al. vs. Southern Athletic Club.

No. 12,045.

J. M. HOYLE ET AL. VS. SOUTHERN ATHLETIC CLUB.

Heirs of Billgery vs. Land Trust of Indianapolis, *Ante.*, p. 890, affirmed.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Frank L. Richardson and Kernan & Wall for Plaintiffs, Appellants.

J. Zach. Spearing and J. J. McLoughlin for Defendant, Appellee.

Argued and submitted March 26, 1896.

Opinion handed down April 20, 1896.

Rehearing refused May 18, 1896.

The opinion of the court was delivered by

WATKINS, J. Plaintiffs, as the heirs of John M. Hoyle, deceased, alleging the ancient title of the deceased and their title by inheritance of the properties described in their petition, aver that the defendant claims to be the owner thereof by devolution of title and *mesne* conveyances, from the Western Land and Emigration Company, which corporation claims to have acquired same on the 15th of December, 1888, at tax sale and adjudication under and in pursuance of Act 82 of 1884.

They further aver that said adjudication is and was null and void upon the following grounds, viz.:

1. For want of notice to them; and that in so far as said act authorized the sale of their property without notice, same is unconstitutional, null and void.

2. That the tax collector was without authority to make the deed of sale to the adjudicatee until the taxes subsequent to the year 1880 had been paid in accordance with its assumption, same being a part of the purchase price.

The prayer of the petition is that they be decreed the owners of said property; and that the titles of the defendant be annulled and canceled and erased from the conveyance records.

The issues presented are the same substantially as those raised in

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the case of *Heirs of Billgery vs. Land Trust of Indianapolis*, and the defendant presents the same issues as the grounds of its defence as those set up in that case.

The question of the unconstitutionality of Act 82 of 1884 was raised in the matter of *Orloff Lake*, 40 An. 142, and overruled; and that decision has since been continuously maintained. *Henderson vs. Ellerman*, 47 An. 306; *Augusti vs. Lawless*, 45 An. 1370; *Martin vs. Langenstein*, 43 An. 791, and other cases.

On the trial there was judgment in favor of the defendant, and plaintiffs appealed.

It is therefore ordered and decreed that for the reasons assigned in our petition in *Heirs of Billgery vs. Land Trust of Indianapolis*, the judgment appealed from in this case is affirmed.

No. 12,138.

48	901
52	210

STATE OF LOUISIANA VS. M. M. MAGEE.

Motions for new trials are universally conceded to rest within the exercise of the sound judicial discretion of trial judges; and same will not be disturbed by an appellate court except in clear cases of abuse or misdiscretion.

A PPEAL from the Sixteenth Judicial District Court for the Parish of Washington. *Reid, J.*

M. J. Cunningham, Attorney General, *Bolivar Edwards*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

J. A. Reid, *P. B. Carter* and *Geo. E. Williams* for Defendant, Appellant.

Argued and submitted April 25, 1896.

Opinion handed down May 4, 1896.

Rehearing refused May 18, 1896.

The opinion of the court was delivered by

WATKINS, J. The defendant appeals from a verdict convicting him of petty larceny, and sentence to imprisonment at hard labor in

the penitentiary for one year; relying solely upon the refusal of the trial judge to grant him a new trial.

The grounds of the motion are of the following tenor, viz.:

1. That the verdict of the jury is contrary to the law and evidence.

2. That during the progress of the trial, the jury being under instructions from the court not to read any public or private communications, or documents, either written or printed, the foreman received from the hands of a deputy sheriff a sealed letter, which he opened and read in violation and disregard of such instructions, to his injury and prejudice.

3. That the judge erred in permitting testimony to be adduced as to the ownership of a hog belonging to Dr. G. W. Varnado, after Dr. Varnado and another witness had testified on the part of the State, that the hog he (defendant) is alleged to have stolen was property jointly and equally owned between them in partnership.

4. That the jury commissioners who drew the *venire* from which the panel which tried his case was drawn were not summoned in the form and manner required by law; and that some of them, by reason of said irregularity and their failure to receive due notification, were not present at the drawing of said jury at all.

5. That the grand jury who found and returned the bill of indictment against him was likewise thus irregularly drawn.

6. That J. N. Varnado, one of the jury commissioners who was present and participated in the drawing of the said *venire*, was a nephew of Dr. G. W. Varnado, the prosecuting witness against him (defendant), and took great interest in the prosecution against him.

7. That the jury separated during the trial.

8. That one of the jurors who tried the case was related to the accused by affinity within the degree prohibited by law, notwithstanding he answered in the negative interrogatories propounded to him by counsel in the course of his examination upon his *voir dire*; and that the truth of the matter was not made known to him (defendant) until since the trial was closed, and verdict had been rendered.

9. That one of the jurors who was empaneled and participated in his trial and conviction was himself under indictment at the time,

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and therefore incompetent to serve as a member of the aforesaid jury.

For the foregoing reasons defendant alleges himself entitled to a new trial of said cause. On the trial of the motion a number of witnesses were sworn, and their testimony was reduced to writing and it appears in the record; and in the course of said trial the defendant's counsel retained seven bills of exception.

I.

With regard to the *first* one nothing need be said, as we have frequently held that this is not good ground for a new trial.

II.

With regard to this objection it is sufficient to say, that the testimony discloses that the letter referred to was wholly unimportant and had no reference to the case under consideration; and as the defendant was accused of a minor offence, this was a trifling and unimportant irregularity not prejudicially affecting his interest.

III.

In so far as the alleged error with regard to the judge having allowed certain objectionable testimony to go the jury is concerned, it is sufficient answer to say that defendant's counsel should have interposed timely objection at the trial of the merits. It is too late to raise the objection, for the first time, upon a motion for a new trial.

IV, V and VI.

We can not perceive that the *venire* was in any way prejudicially affected by the fact that some of the jury commissioners were not served with written summonses; and that one of them was not present and took no part in the proceedings. There were four out of five commissioners present and they participated in the selection of the *venire*; and it is presumably regular and was legally constituted.

The testimony fully satisfies us that the jury commissioner, Varnado—of whose action the defendant complains—did not say anything to unduly or improperly influence his associates in placing upon the *venire* persons who were inimical to the interest of the defendant. This jury commissioner and his nephew, who was on the

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petit jury who convicted the accused, were both interrogated as witnesses on the trial of the defendant's motion for a new trial, and their testimony completely exonerates them from any improper action or influence against the accused.

In our opinion this case does not present the same issue as that raised and decided in *State vs. Duncan*, 47 An. 1025.

VII.

It is of no consequence that the jury should, in a case of this sort, have been permitted to separate under the instructions of the judge.

VIII.

The contention of the defendant, that one of the jurors who assisted in the trial and participated in his conviction was disqualified by reason of the fact that he was at the time under indictment before the same court for the commission of two different offences, ought to have been urged at the trial, and comes too late, it being for the first time urged upon a motion for a new trial.

It appears from the testimony adduced upon the trial of the motion that two indictments against the juror in question were on file in the clerk's office of the parish of Washington, wherein the defendant was being prosecuted, and that this information was easily attainable.

It further appears that one of the defendant's attorneys in this case was one of the attorneys for the defendant in the two cases mentioned and relied upon.

Upon this state of facts it was the plain duty of the counsel for the accused to have procured and adduced this evidence on the trial of the merits; and to have predicated thereon an objection to the aforesaid juror on the ground of his disqualification.

The objection is out of time.

IX.

The testimony fails to support the defendant's contention that one of the jurors who tried the case was related to him by affinity within the degree prohibited by statute; on the contrary, it discloses that the juror in question was remotely related to the wife of the accused, but not to the accused himself.

The foregoing are all the grounds that are enumerated in the

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defendant's motion, and a careful consideration of them has convinced us that they are without merit.

The seven bills of exception which defendant's counsel, *ex industria*, retained to rulings of the trial judge during the progress of the trial of his motion for new trial appear to be technical and of similar tenor; and as they are germane to the several grounds of the motion which we have examined and disposed of, they must share the same fate.

Judgment affirmed.

No. 12,130.

STATE EX REL. ILLINOIS CENTRAL RAILROAD COMPANY vs. THE
JUDGES OF THE FOURTH CIRCUIT COURT OF APPEALS.

48 905
50 440

A judgment must be read and signed by the judge in open court, unless there is an agreement of the parties, or their counsel, that he may take the cause under advisement and sign a judgment in chambers after the term of court has adjourned.

ON APPLICATION for Writs of *Certiorari* and Prohibition.

Farrar, Leake & Lemle for Relator.

Submitted on briefs April 20, 1896.

Opinion handed down May 4, 1896.

The opinion of the court was delivered by

WATKINS, J. The representations of the relator are, that one Ellen Johnson instituted suit against it for two thousand dollars damages for alleged injuries received, and that on trial there was judgment rendered in plaintiff's favor for the full amount claimed, from which relator suspensively appealed to the respondents' court at its session to be held in the parish of Tangipahoa on the second Monday of February, 1895.

That at said term said cause was duly argued and submitted to the respondents, and that at the time of the submission it was agreed that the respondents should decide the case at chambers, each party

State ex rel. Railroad Co. vs. Judges.

having the right to apply for a rehearing within ten days from the filing of the judgment in the clerk's office of said parish.

That respondents held said cause under advisement from February, 1895, to the February term of 1896, when they announced their inability to agree; and they thereupon appointed J. M. Wilson, Esq., of Greensburg, to act as judge *ad hoc*, and soon thereafter adjourned their court *sine die*.

That it made objection, at once, to the selection and appointment of said judge *ad hoc*, and gave to the respondents due and timely notice thereof; and further notified them that its consent and agreement to permit said cause to be decided in chambers only applied to them personally, and did not apply to the aforesaid judge *ad hoc*; and that it could not and would not agree to the court, as at present constituted, hearing and deciding the case in chambers.

That it urgently insisted upon respondents' assigning the case for reargument in open court, at its next regular session in the parish of Tangipahoa, on the second Monday of July, 1896, when it desired to tender to the court a plea of recusation of the aforesaid judge *ad hoc*; and that it was subsequently informed by one of the respondents that, after having had a conference with his associate, it had been determined to refuse its request, but that they would convene their court *in Amite City on the first Monday of April, 1896*, to pass upon such motion for the recusation of the judge *ad hoc* as it should desire to tender.

That it was further informed that respondents could, in the event its motion was disallowed, at once proceed, with the assistance of said judge *ad hoc* to decide the case, after hearing argument; and, in the event its motion should be sustained, to appoint some other attorney at law, and proceed, with his assistance, to decide the case, after hearing argument.

Thereupon relator avers that respondents have no right, or power to hold a regular or special term of the Court of Appeals *on the first Monday of April, 1896*, and that their action is at variance with the provisions of the Constitution, which fixes the terms of said court in the parish of Tangipahoa on the second Mondays in February and July of each year. Const., Arts. 98 and 99.

That all final judgments must be rendered in open court (C. P. 543), and it necessarily follows that their judgment must be rendered in term time, as indicated in the Constitution, unless there is an agreement to the contrary.

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Wherefore the prayer of the relator is for the issuance and maintenance of the writs of *certiorari* and prohibition.

One of the respondents returns that the averments of the relator are substantially correct, and submits the matter to the court; and the other respondent made like return, with this exception, that the agreement of counsel that the cause be decided at chambers comprehended, in the opinion and practice of their court, "all proceedings necessary to be had in said cause (up) to final judgment."

On this statement of the case two propositions are evident: (1) that the respondents are without power to convene their court for the transaction of business at any other places or times than those which are particularly designated in the Constitution; (2) that causes at issue in their court can not be taken under advisement by them and decided in chambers without a specific agreement of parties, or their counsel, of record, to that effect.

The Constitution designates the times and places at which respondents must hold sessions of their court; and it has been frequently decided by this court that the signing of final judgments by a judge is a judicial act which can only be performed in term time; and that his signature affixed to a final judgment out of term time will have no legal effect. *Culver vs. Leovy*, 21 An. 306; *Hernandez vs. James*, 23 An. 483; *State ex rel. Dixon vs. Judge*, 26 An. 119; *Succession of Bougère*, 29 An. 378; *Laurent vs. Beelman*, 30 An. 363.

The Code of Practice declares, in terms, that "all judgments must be read and signed by the judge, in open court." Art. 548.

But it has been decided that it is competent for the parties to a suit, or their counsel of record, to make an agreement "*that the judge who tries the case shall take it under advisement and render a judgment, and sign it after the court shall have adjourned.*"

Morrison vs. Citizens Bank, 27 An. 401; *Green vs. Reagan*, 32 An. 974; *City vs. Gauthreaux*, 32 An. 1126; *Rust vs. Faust*, 15 An. 477.

This record furnishes no proof of an agreement to permit the respondents to take relator's case under advisement, and render and sign a final judgment in chambers, except what we have quoted from the petition and return.

It may well be—and that is relator's contention—that when the agreement was made, it was not within the contemplation of the parties that a disagreement between respondents would necessitate the selection of a judge *ad hoc*.

Harris vs. Minvielle.

We are of opinion that relator has stated a case entitling it to relief.

It is therefore ordered and decreed that the provisional writ of prohibition be made peremptory at the cost of respondents.

No. 12,096.

GEORGE HARRIS VS. GEO. P. MINVIELLE.

No man may disparage the reputation of another. Every man has a right to have his good name maintained unimpaired. His right is a *ius in rem*; a right that is absolute and good against the world.

Words which produce any perceptible injury to the reputation of another, are defamatory, and, if false, are actionable.

Every repetition of a slander originated by a third person is a wilful publication of it, rendering the person so repeating it liable to an action in damages for slander and defamation of character. "Tale-bearers are as bad as tale-makers." And it is no defence that the speaker did not originate the scandal, but repeated what he had heard from another, even as a rumor, and he, in good faith, believed it to be true. Nor is it any defence that such person gave the name of the author.

A PPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

Foster & Broussard and Thorpe & Thorpe for Plaintiff, Appellant.

Walter J. Burke and A. & C. Fontelieu for Defendant, Appellee.

Argued and submitted April 22, 1896.

Opinion handed down May 4, 1896.

The opinion of the court was delivered by

WATKINS, J. This is a suit for the recovery of ten thousand dollars damages for slander and defamation of character, and from the verdict of a jury in favor of the defendant and a judgment thereon based, the plaintiff has appealed.

The following are, substantially, the grounds of plaintiff's action, to-wit:

That he is and has been a public merchant engaged in business in the town of Jeanerette, in the parish of Iberia, and upon the income

48	908
52	1374
48	908
1104	507
48	908
107	759
48	908
109	703
48	908
111	336

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of his business he is, exclusively, dependent for the maintenance of himself and family.

That his character has always been of the best, his social standing good and irreproachable, and his rating as a merchant solvent, undoubted and honorable; and that his success in business was and is dependent upon his standing and character in the community in which he lives.

That he has been for very many years a member of the Masonic fraternity in good standing.

That the defendant did, upon the public streets of said town of Jeanerette, during the month of February, 1895, "unlawfully, wantonly, maliciously and without probable cause, defame and publicly slander your petitioner by openly declaring to Fred. Ansley, in the presence of John T. White and Leo Frank, that your petitioner was a 'c—k s—r,' and that he could prove it."

That on or about the 5th of February, 1895, the defendant did, on the streets of said town of Jeanerette, publicly proclaim said slanderous and defamatory statement, in the presence and hearing of J. W. Redmond, George W. Whitworth and many others—accompanying such "untruthful slander with abusive and violent language, cursing and maligning him without cause."

That the slanders thus publicly proclaimed by the defendant as above set forth, "have caused his friends, the members of the Masonic fraternity, the community in which he lives, and the general public to doubt his virtue, his manhood, and his honor; to ostracize his motherless children, to view him as a Pariah—a thing of disgusting infamy—thereby causing him heavy, permanent and irredeemable pecuniary loss, damaging his business reputation, and causing him deep mortification, annoyance and mental anguish."

Petitioner shows that the iniquity of the charges herein has become so publicly notorious that the State (of Louisiana), in the furtherance of justice and good morals, has criminally indicted (the defendant) for maliciously slandering him;" and in proof of this averment he annexes the bill of indictment to his petition.

He claims of the defendant the sum of two thousand five hundred dollars for the actual loss and damage he has suffered by direct injury to his commercial business through the instrumentality of the slander thus circulated; and the further sum of seven thousand five hundred dollars by reason of the mortification, annoyance, public

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contempt and odium it has occasioned him, as well as the social ostracism it has occasioned his family.

For answer the defendant avers that he is not the author of the reports which are charged in plaintiff's petition as coming from him; but that these were current reports in the town of Jeanerette; and that whatever he did say relative thereto was said to a committee of the Masonic fraternity who were investigating the aforesaid charges, at the instance and solicitation of the plaintiff, who is a member of said organization, submitting to its rules and regulations.

He avers that the aforesaid communications were and are of a privileged nature; and whatever other remarks he may have made upon the subject at issue were made in answer to questions propounded by the plaintiff to him.

On these issues the parties went to trial, and the following is a fair summary of the evidence which is disclosed by the record, viz.:

John Redmond, the leading and principal witness for the plaintiff states, that the defendant told him, in February, 1895, that the plaintiff was a c—k—s—r, and gave him the names of the parties who furnished him that information. This conversation took place on one of the principal streets of Jeanerette, near Dr. McGowan's drug store.

That defendant came to him (witness) and made this statement confidentially, and requested him to say nothing about it. That he said he knew nothing, positively, but had heard it from certain persons whose names he gave—that of Abner Smith being the only one whose name he could recall; though he said they were all negroes.

This witness said that he had lived in Jeanerette for some time, but had never heard of this charge against plaintiff prior to that interview.

Another witness states that he has resided in Jeanerette for eighteen years, and has known the plaintiff for fifteen years, but had never heard of the charge against him until February, 1895. That he had not heard the defendant make the statement, but had heard that he had made it in a public manner. That Mr. Redmond was the first person from whom he had heard anything of the affair; but that soon afterward "every one was talking about it;" that it "took immediate circulation."

Being requested to mention the names of some of the persons he

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had heard speaking of it, he said "there were so many of them that he could not recall even a few of them, but he gave the name of Leo Frank.

He states that, up to the time of this disclosure, plaintiff's reputation had been good, and that he had been several times elected a member of the City Council of Jeanerette, and that he had stood well with the people of the parish in local politics. That he had always appeared to be a fairly successful man in business enterprises. That his credit and social standing had been good, but "since the circulation of these rumors plaintiff and his family had been almost wholly ostracized."

Leo Frank—the witness named above—says he has resided in Jeanerette for the past eight years, and has known both the parties to this suit during that time. That the defendant had said to him that he had heard the aforesaid charges against the plaintiff. He said that plaintiff's social standing and character were good up to the time this report was put in circulation in February, 1895. That same had considerable effect upon him "for the worse."

He said that he had first heard the report from Mr. Redmond, but that soon after, so many persons were talking about it that he could not remember their names. That the defendant told him that from all the reports he had heard, and from all the rumors, he believed the charge to be true, and made this declaration publicly. He further states that when this rumor was put in circulation, an informal committee of Masons began to investigate the matter, and that it was *subsequently* that the defendant spoke to him about it, but that he obtained his information from Mr. Redmond *prior* to the organization of this informal committee.

Another witness says he heard the defendant affirm his belief in these charges against the plaintiff upon information he had received. That he heard him make this statement in several different places and in the presence of several different persons.

Another witness states that the day *after* the meeting of the informal committee a colloquy occurred between the plaintiff and the defendant in reference to the charges which had been put in circulation. That the plain iff "in a tone of wrath began to denounce the defendant, accusing him of starting these reports upon him and demanding retraction. The defendant said he did not originate

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these reports, but that he believed every word of them, and that the plaintiff ought to be drummed out of the community and despised by every decent man."

In other respects the statement of this witness is similar in import to that of other witnesses, and they all agree that subsequently a *formal* committee of investigation was appointed by the Masonic Lodge of the town of Jeanerette, upon its own motion, and not at the suggestion or request of plaintiff, notwithstanding he was a member of that organization.

They concur in the statement that Abner Smith and the other negroes who were mentioned by the defendant as the persons from whom he had derived the information, on the faith of which he had made the confidential communication to Mr. Redmond, had been produced before that committee and had made a statement to them.

At the conclusion of the plaintiff's testimony by other witnesses, the plaintiff was, himself, placed upon the witness stand; and in the course of his evidence he emphatically and circumstantially denied the aforesaid charges, and affirmed his entire innocence of them. He says that the circulation of the rumor commenced with Mr. Redmond. That he never heard of it before, or as coming from any other source.

In other respects, this witness corroborates the averments of his petition, and supports his allegations of injury and damage at the hands of the defendant. In this his testimony is supported by that of his other witnesses.

But, as a matter of fact, is it true, that the alleged slanderous and defamatory statements of the defendant were made to the committee of the Masonic fraternity, as he avers in his answer.

Circumstantially, this statement is contradicted by several witnesses; and from the testimony of another leading witness we quote the following, viz.:

"Q. Did you, as a member of the informal committee, or as a member of the regular committee, have the defendant before you?

"A. No, sir.

"Q. Did he ever appear as a witness, or in any other capacity, before either committee?

"A. He did not.

"Q. Was he in the neighborhood, or was he close enough to the

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deliberations of the committee, that you could have heard, as a member of that committee, what he said, if anything he did say?

"A. No, sir."

The foregoing statement, and the result of the committee's investigation, completely sets that pretension at rest, and the sequel is illustrated by a criminal indictment which was found against the defendant on that account.

The trend of the defendant's evidence is to show that a similar rumor to the one recently circulated was extant several years ago; but same was traced directly to the man Abner Smith and two or three other negroes, of whom nothing was affirmed by defendant's witnesses except their hearsay declarations. Neither of these parties were produced by the defendant as his witnesses.

One of the defendant's witnesses—a justice of the peace in the town of Jeanerette—testified that the plaintiff caused Abner Smith to be arrested for criminal libel, and brought before his court for trial; and that he, in the presence and hearing of defendant and a number of persons, went down on his knees and swore to the truth of the charges he had made against the plaintiff—giving the most shocking details.

But strange to say only one of those people could be, or was produced as a witness to affirm the truthfulness of the statement. Yet, on the contrary, Abner Smith was placed on the stand by the plaintiff in rebuttal, and he circumstantially denied the truth of the testimony of the justice of the peace. And one of the defendant's witnesses who affirmed its truth and made the statement that the plaintiff was present in the justice court and heard the declaration of Abner Smith was flatly contradicted by the plaintiff, who took the stand in rebuttal and said the witness' statement was "false from beginning to end;" and that the testimony of both of those witnesses at the criminal trial was *entirely different*.

But it is a striking and noteworthy fact that the defendant did not take the stand as a witness in his own behalf, and contradict or explain the damaging charges which were brought against him by the witnesses of plaintiff.

The law of slander and defamation of character is plain, unambiguous and of easy application to the evidence adduced.

Odgers, in his treatise on the law of libel and slander, says:

"No man may disparage the reputation of another. Every man has

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a right to have his good name maintained unimpaired. This right is *jus in rem*; a right that is absolute and good against the world.

"Words which produce any perceptible injury to the reputation of another are called defamatory; (and) defamatory words, if false, are actionable.

* * * * *

"Words which on the face of them *must* be injurious to the reputation of the person to whom they refer are clearly defamatory and, if false, are actionable, without proof that any particular damage has followed from their use" (pp. 1 and 18).

The principle adopted by the English courts, and which is announced by Odgers as having received the sanction of American courts as well, is words are actionable as slanderous, "whenever they sound to the disreputation of the person of whom they were spoken." *Button vs. Hayward*, 8 Mod. 24.

That the charge preferred against the plaintiff comes clearly within that principle will not be denied—could not be, under the defendant's answer—in view of the fact that, under our law and jurisprudence, the courts of this State are not bound by the technical distinctions of the common law, as to words actionable *per se* and not actionable *per se*," etc.

Spotorno vs. Fourichon, 40 An. 423; *Miller vs. Holstein*, 16 La. 389; *Daly vs. Van Benthuyssen*, 3 An. 69; *Tresca vs. Maddox*, 11 An. 206.

But the defendant seeks to justify himself on the ground that the disclosures he made were privileged because they were made to a public investigating committee and in the interest of the public. The proof shows, however, that this position is untenable in point of fact; and the most that can be said in this behalf is, that some of defendant's reiterations of the rumor which was so quickly spread abroad were made contemporaneously with the investigation.

Mr. Odgers says:

"It is a defence to an action of libel or slander to prove that the *circumstances* under which the defamatory words were written or spoken afforded an excuse for their employment. And this is so, even though the words be proved or admitted to be false. Circumstances will afford an excuse for writing or speaking defamatory words whenever the occasion is such as to cast upon the defendant a *duty*, whether legal or moral, of stating what he honestly believes to be the plaintiff's character, and of speaking his mind fully and

freely concerning him. In such case the occasion is said to be *privileged*, and the employment of the defamatory words on such privileged occasion is, in the interest of the public, excused" (p. 182).

But that author, in amplifying the doctrine, in treating of the exercise of the *qualified privilege*, says:

"In less important matters, however, when the interests of the public do not demand that the speaker should be freed from *all* responsibility, but merely require that he should be protected, so far as he is speaking honestly for the common good; in these the privilege is said not to be *absolute* but *qualified* only; and the plaintiff will recover damages in spite of the privilege" if he can prove that the words were not used *bona fide*, but that the *defendant availed himself of the privileged occasion wilfully and knowingly to defame the plaintiff.*" *Id.*, p. 183.

In the first place, the evidence does not bring the defendant within the operation of the privilege; but even if that were doubtful, we are of the opinion that the testimony fairly discloses that the defendant sought to shelter himself under the plea of privilege subsequent to his having both confidentially and publicly put the charge against the plaintiff in circulation.

This is, in the sense of the law, a slander, a defamation of character that is actionable.

But the defendant makes an attempt at justification, on the ground that the charges plaintiff complains of were of long standing; that he only *repeated* a rumor that had been previously circulated by others.

Odgers says:

"Evidence of the truth of the slander or libel is, therefore, inadmissible, unless a justification is pleaded. Evidence of a rumor that the plaintiff had, in fact, committed the offence charged against him, clearly falls short of justification, and is, moreover, objectionable as hearsay." *Id.*, p. 304.

And another author, in treating of the repetition of slanders originated by others, says:

"Every repetition of a slander originated by a third person is a wilful publication of it, rendering the person so repeating it liable to an action. 'Tale-bearers are as bad as tale-makers.' And it is no defence that the speaker did not originate the scandal, but heard of it from another, even though it was a current rumor, and he, in good

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faith, believed it to be true. Nor is it any defence that the speaker at the time named the person from whom he had heard the scandal." Newell on Defamation, Slander and Libel, p. 350.

That author says that it is no answer for a defendant to say: "There was such a story in circulation; I but repeated what I heard and had no design to circulate or confirm it." *Id.*, p. 351.

The text of that treatise is in keeping with the decisions of the highest courts in several of the States.

For instance, it was said in *Kinney vs. McLaughlin*, in 71 Massachusetts 3, viz.:

"The story uttered or repeated by the defendant contained a charge against the plaintiff of a nature to destroy her reputation. It is no answer, in any form, to say that she only repeated the story as she heard it. If it was false and slanderous she must repeat it at her own peril. There is safety in no other rule. Often the origin of slander can not be traced. If it were, possibly it might be harmless. He who gives it circulation gives it power of mischief. It is the successive repetitions that do the work. A falsehood often repeated gets to be believed."

See also to the same effect the following cases, viz.: *Frank vs. Browly*, 112 Ind. 190; *Wheeler vs. Shields*, 2 Scappe (Ill.) 348; *Dale vs. Lyon*, 10 Johns (N. Y.) 447; *Hastings vs. Stetson*, 126 Mass. 329.

We have given this case special attention and examined it with care, and have reached the conclusion that plaintiff has clearly established the charges his petition prefers against the defendant, and that he is entitled to be compensated in damages.

In such a case as this, the charges made by the defendant are so far-reaching in their consequences and effect that it is a task of great difficulty for a court of justice to place an estimate upon the damage plaintiff has suffered in consequence of them; but, in our opinion, the sum of one thousand dollars will be sufficient to punish the defendant, and deter him from publishing libellous statements in the future, though it fall far short of repairing the injury he has done the plaintiff.

It is therefore ordered and decreed that the verdict of the jury and the judgment of the court thereon based be annulled and reversed; and it is further ordered and decreed that the plaintiff do have and recover of and from the defendant the sum of one thousand dollars, and that he be taxed with the costs of both courts.

Trosclair vs. Lasseigne.

No. 12,125.

L. J. TROSCLAIR VS. MRS. FELIX LASSEIGNE.

There is only a question of fact at issue in this case, whether or not the property could be divided in kind.

A PPEAL from the Eighteenth Judicial District Court for the Parish of Lafourche. *Caillouet, J.*

Clay Knobloch & Son for Plaintiff, Appellee.

Beattie & Beattie for Defendant, Appellant,

Submitted on briefs April 24, 1896.

Opinion handed down May 4, 1896.

The opinion of the court was delivered by

MCENERY, J. The judgment appealed from decreed a partition by licitation, and the seed cane was recognized as plaintiff's property, with the right reserved to him to have it sold separately from the property and to appropriate the proceeds, or to take possession of the cane, at his option. The claim for compensation of the stubble was rejected.

The record shows that it is impracticable for a division in kind to be made. A division of this kind would give all the buildings to plaintiff, as they are located on the lower side of the main tract. The canal is a necessary adjunct or appendage to the property. It can not be divided, and its exclusive ownership by one of the parties would greatly decrease the value of the property.

The District Judge, who is acquainted with the location, and was in a position to give full weight to the testimony, says: "It is impossible to make a division in kind of the whole property."

The defendant offered to waive her claim to the buildings on the main tract. This same proposition was made by defendants in the case of *Soniat vs. Supple*, 48 An. 296, and in that case we decided that such a proposition was in the nature of a convention to be made by the parties to the suit, and could not be entertained by the court to influence the judgment to be rendered.

Bush Wine and Liquor Co. vs. Wolff et al.

The stubble gave no permanent improvement to the place, and the evidence, as the trial judge states, did not clearly establish that the stubble gave any increased value to the property. The seed cane is the plaintiff's separate property. It had been cultivated and raised by him, and can be disposed of by him at his pleasure.

Judgment affirmed.

48	918
48	546

No. 12,020.

ISADOR BUSH WINE AND LIQUOR COMPANY VS. LEOPOLD WOLFF
ET AL.

Two agreements of contemporaneous date, one of which is signed by creditor and debtor, and the other by the debtor and surety, and each making reference to the other, must be construed together, and thus construed, what is doubtful in one may be made clear by what is found in the other.

An agreement to extend a line of credit for a certain amount, coupled with a stipulation for the payment of all goods purchased, binds a surety for a general balance of account.

A PPEAL from the First Judicial District Court for the Parish of Caddo. *Land, J.*

Thigpen & Foster for Plaintiff, Appellee.

Wise & Herndon and *Solomon Wolff* for Holzman, Defendant, Appellant.

Argued and submitted January 21, 1896.

Opinion handed down February 10, 1896.

Rehearing refused May 4, 1896.

The opinion of the court was delivered by

WATKINS, J. The object of this suit is to recover of Leopold Wolff as principal and Ben Holzman as surety the sum of three thousand four hundred and seventy-four dollars and ninety-seven cents, as the balance due upon a current account of 1894.

Various dilatory pleas were interposed and overruled, and, after answer filed, judgment was rendered against both defendants *in solido*, from which Holzman alone has appealed.

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The question which is exclusively controverted in this court is the liability *vel non* of the surety.

The stipulation of the agreement which the counsel of the surety relies upon as controlling, and interpretation of which must necessarily be decisive, is: "The Isador Bush Wine and Liquor Company agrees to extend a line of credit to said Wolff of five thousand dollars," and their contention is that he became liable thereunder for five thousand dollars and no more.

That five thousand dollars was the limit of his obligation, and when that limit was reached by the advancement of that sum his responsibility was at an end.

On the other hand, the contention of the plaintiff's counsel is, and the opinion of the judge *a quo* was, that the surety is liable for any balance of account up to five thousand dollars.

We subjoin the following statement of account between the parties, as fairly illustrative of the contentions of the respective parties, to-wit:

Mdse. sold to L. Wolff	\$8,890 62
Cash advanced	150 00
	<hr/>
	\$9,046 62
On this there has been paid	5,649 31
	<hr/>
Balance	\$3,397 31
To which add interest, deducted from the several payments.....	77 66
	<hr/>
	\$3,474 97

On this showing, it appears that the plaintiff sold Wolff merchandise to the amount of eight thousand eight hundred and ninety-six dollars and sixty-two cents, and there has been paid thereon the sum of five thousand six hundred and forty-nine dollars and sixty-two cents by Wolff. If the surety's contention be accepted as the correct one, Wolff has enjoyed the full benefit of his suretyship, and has discharged him by making the aforesaid payment, it being in excess of five thousand dollars. But if that of plaintiff be accepted, the surety is still bound, and must respond to the general balance of account.

There is no controversy as to the correctness of the debt.

There were two agreements, one of which was made by and between Isador Bush Wine and Liquor Company and L. Wolff, and the other between L. Wolff and Ben. Holzman—both of contemporaneous date.

In the former it was agreed that plaintiff had consented to "ex-

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tend a line of credit to said second party to the amount of five thousand dollars," provided Wolff should furnish Ben. Holzman "as surety for the payment of all goods purchased by said Leopold Wolff from the Isador Bush Wine and Liquor Company under their agreement in the year 1894."

In the latter, Wolff, as principal, and Holzman, as surety, bound themselves "in the sum of five thousand dollars, to be paid to said Isador Bush Wine and Liquor Company," etc., the condition of which is "that whereas the said Isador Bush Wine and Liquor Company has entered into a contract with Leopold Wolff, of even date herewith, by which it agrees to extend to said Wolff a line of credit amounting to five thousand dollars; *now if the said Leopold Wolff shall and will pay for the goods purchased from the said Isador Bush Wine and Liquor Company in accordance with the terms and conditions of the agreement herein referred to, then this obligation shall be void, otherwise it shall remain in full force and effect.*"

By this phraseology it becomes apparent that Holzman, as surety, bound himself just as Wolff had bound himself. He bound himself to the performance of the stipulations of the contract between the wine and liquor company and Wolff. It must be observed that their engagement provided not only that the wine and liquor company should "extend a line of credit" to Wolff to the amount of five thousand dollars, but the latter bound himself to furnish a bond for five thousand dollars, executed by himself and Ben Holzman * * * as surety, for the *payment of all goods purchased by said Leopold Wolff from the said Isador Bush Wine and Liquor Company, etc.*, and that Ben. Holzman became a party to this engagement.

These agreements have the effect of law between all the parties thereto, and we must give to them the interpretation which their terms plainly import. The condition of Holzman's contract was that Wolff should "pay for the goods purchased" from the wine and liquor company; and the condition of Wolff's engagement was "to furnish Ben Holzman as surety for the payment of *all goods purchased*" by him from the wine and liquor company.

We have carefully considered the argument of counsel with reference to the term "line of credit" which is employed in both of the contracts and the authorities cited as bearing on the question.

Their contention is that that term had the effect of placing a limitation upon the liability of the surety, and restricted same to the

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amount of five thousand dollars; and that he can not consequently be held bound for more.

In this connection we have examined the decision of the court, *The American Button Hole, etc., Machine Company vs. Gurnee*, 4 Wisconsin, 49, which has been pressed upon our attention; but we find that the argument in that case was that the term "line of credit" had the effect of *continuing* and *extending* the limit of the surety's obligation, and the court, while they discharged the surety on a different ground, seemed inclined to recognize the interpretation placed upon it by counsel.

We have also noticed the case of *Gerson vs. Hamilton*, 30 An. 737, and *Stewart vs. Lewis Bros.*, 42 An. 37, but we are of opinion that they are consistent with the views herein expressed. The contract of Holzman is one of suretyship under the provisions of our Code and not one of commercial guaranty. It was made by and between citizens of this State, and did not have any extra territorial effect. The surety bound himself absolutely for a certain sum, payable in any event.

The judge of the District Court entertained this view, and we are of his opinion.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

Our conclusion is that the principles of law upon which we rested our decision are correct, and it must therefore stand.

But we are of opinion that the appellant, having bound himself for the payment of all "good purchased" by the defendant Wolff did not become liable to the plaintiff for "cash advanced," and consequently he is entitled to a reduction on the judgment of one hundred and fifty dollars on that account.

It is therefore ordered and decreed that judgment appealed from be amended by giving the appellant, as surety for defendant, credit for the sum of one hundred and fifty dollars; and that, as thus amended, the same be affirmed—the plaintiff and appellee being taxed with the costs of appeal.

Rehearing refused.

West vs. Negrotto, Sr.

No. 11,942.

GEORGE W. WEST VS. DOMINGO NEGROTTTO, SR.

The effect of a failure by a purchaser at a tax sale to pay all taxes due at the time of purchase would be to leave such purchaser without title; but the State would still remain the owner under a prior adjudication to it which legally vested title in itself. So when the original owner of property adjudicated to the State proceeds by a petitory action against the purchaser at tax sale, in possession under a tax collector's deed, his suit will be successfully met by the fact that his title has passed to the State and he can not recover, because of the weakness of title in the tax purchaser.

Plaintiff in a petitory action, who declares upon a particularly specified title is confined to that title on the trial.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rigtor, J.

F. L. Richardson and Kernan & Wall for Plaintiff, Appellee.

J. Zach. Spearing for Defendant, Appellant.

Argued and submitted March 14, 1896.

Opinion handed down April 6, 1896.

Rehearing refused May 4, 1896.

The opinion of the court was delivered by

NICHOLLS, C. J. The property in litigation in this suit was, while standing assessed in the name of George West, adjudicated to the State, first under Act No. 77 of 1880, for the unpaid taxes of 1881, and later, under Act 96 of 1882, for the unpaid taxes of 1882 and 1883. While so situated it was offered for sale under Act 82 of 1884, and adjudicated to the defendant Negrotto on the 14th day of August, 1888, for the unpaid State taxes for the years 1876, 1877 and 1878, assessed in the name of plaintiff West. The city taxes for all the years from 1870 to 1879 were also due. At the date of the adjudication additional State and city taxes from 1880 up to and inclusive of 1888 were also due. The property was adjudicated to Negrotto under a bid made by him for one dollar, which he paid. Notwithstanding he failed to pay the State and city taxes due for the period between 1880 and the date of his purchase, the tax collector gave him a deed to the property. This he should not have done,

48	922
50	42
48	922
52	382
52	384
52	386
52	388
52	2046
48	922
109	120

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as under the law under which the purchase was made it was Negrotto's duty, in addition to the amount of his bid, to have paid all the State and city taxes then due. Under the third section of Act 82 of 1884, it was the duty of the tax collector to execute to each adjudicatee a deed of sale by notarial act, but only when the bid was complied with. The notary public was not authorized to pass the act until he had evidence before him of the payment of all taxes, city as well as State. The purchaser by virtue of his bid and the adjudication had come to have (just as an adjudicatee at execution or succession sale) certain rights entitling him to a specific performance of the contract of sale by compliance with his bid, and he was entitled to a reasonable delay to make payment to the city of the taxes due to her, but (as was determined by this court in *Remick vs. Lang*, 47 An. 914) he could take nothing by an illegal giving to him by the tax collector of a deed of sale when he failed to comply with his bid. He was really without title until he had done so. Had the original owner, West, while matters were in that situation, made payment to the State of the taxes due to it on the property, and had the State officers thereupon permitted him to redeem the same though he was out of time, the tax purchaser, Negrotto, would not have been in a condition to call such action in question, he being in default and having no rights himself. West, under such circumstances, would have occupied the position of *Remick* in the suit of *Remick vs. Lang*, but he did not do so. On the contrary, Negrotto, who from 1888 to 1898 had paid none of these taxes himself, went forward, paid the taxes and obtained a certificate of redemption on the 29th day of March, 1898.

When the city of New Orleans found that the title of the property had passed from the State to Negrotto, and that its way was therefore free to pursue remedies in enforcement of payment of its past due taxes, it found among those taxes those which had stood on its books since 1880, under the assessment in the name of West, which it had been the duty of Negrotto to have paid under the adjudication to him. It therefore proceeded to offer the property for sale at auction, and at the sale it bid it in itself on July 12, 1898, but this was after Negrotto had (though tardily) paid the delayed State taxes and had received the certificate of redemption we have spoken of. West, after this, went forward and paid to the city its delayed

West vs. Negrotto, Sr.

city taxes, and thereupon the city authorities gave him a certificate of redemption.

He has brought a petitory action against defendant, setting up and establishing the title held by himself at the time the property was adjudicated to the State. Negrotto set up the adjudications to the State, the adjudication to himself from the State, and the deed held by him thereunder. Plaintiff then, over defendant's objection, offered in evidence the adjudication made to the city of New Orleans, in its proceedings against the property for the unpaid taxes and the certificate of redemption granted to himself by the city. The District Court rendered judgment in favor of the plaintiff for the property and in favor of the defendant on his reconventional demand for reimbursement in case of eviction. Defendant appealed.

Plaintiff's theory is, that his original title remained unaffected by the tax sales. We have examined the adjudications made to the State, and we discover in them no ground for complaint. His real attack is on Negrotto's rights, under his own adjudication from the State, and the certificate of redemption, subsequently granted him by the State authorities.

The present plaintiff, West, says now what Lang said in the other case—that the State authorities were without power to permit this to be done at the late day it was done; that Negrotto having failed to comply with his bid, he obtained no standing at all by the adjudication to him; that he was an absolute stranger to the title, and payment by him could not confer or confirm title; that he has no title to redeem. That may or may not be true. Grant it to be true that the State authorities should have declined to receive payment from his hands, and should have refused a certificate, does that fact advance plaintiff at all?

If the various acts of adjudication of this property to the State were, in all respects, regular and legal and vested the title to the same in the State, in what way would a failure by Negrotto to have paid, as he should have done, all taxes due at the time of his purchase redound to the benefit of West? The only effect of this non-compliance would be to leave Negrotto without a title, but to leave the State itself as the owner of the property under the adjudication made to it.

Negrotto's failure to pay would not invest title in West. If Negrotto is improperly in possession under the tax collector's deed

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(let it be granted improperly in possession), is not West's attack against Negrotto, through a petitory action, successfully met by the fact that, even if Negrotto has no title, West himself has none, as his title has passed to the State. There can be no question on that point. In order to get into position as a plaintiff in a petitory action (under his original title) West would have to appear before us reinvested (regularly or irregularly) with title by the State, as Remick did in *Remick vs. Land*. This he has not done. The State authorities have placed it out of their power to enable West to get into such position as a plaintiff by granting a certificate of redemption, not to West, but to Negrotto.

So long as the adjudications to the State stand they are interposed as walls, effectually blocking West in his attempt to reach Negrotto by reason of the weakness of his title, under the adjudication made to him in 1888, and the certificate of redemption which he holds from the authorities. West, in order to succeed in this suit, under his original title, would have to make a successful attack, not only upon the adjudication to Negrotto, but upon the adjudications to the State. This he has not done. But, says the plaintiff, when the city found the property in Negrotto's possession and its taxes unpaid, it had the right to proceed to enforce the same. It did enforce those taxes and it became the owner of the property by adjudication to itself, and any title which Negrotto might have had at that time was cut off. The city being then the owner of the property, at a tax sale made by it in enforcement of taxes in the name of George West, had the right to permit West to redeem the property, and it did so, and therefore he (West) appears before us in this suit as holding the city title, which cut off Negrotto's (if he had one), to which are coupled the rights belonging to himself by virtue of the city's having permitted him to redeem. The weakness of plaintiff's position is just at this point. The title, if it be a good one, as against Negrotto, who is in possession of the land, is not the title on which this suit was brought. Plaintiff expressly declared upon his original title, and to that title he must be confined in the present suit, as defendant excepted to evidence going to show any title other than the one on which the action was brought. We think the judgment erroneous.

It is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and re-

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versed, and it is now ordered, adjudged and decreed that the adjudications made of the property in litigation herein to the State in 1883 and 1884, in enforcement of the taxes of the years 1881, 1882 and 1883, assessed in the name of George W. West, the plaintiff herein, divested plaintiff's ownership in said property and vested the same in the State of Louisiana, and said fact stands as a bar to plaintiff's action on his original title, but plaintiff's rights, if any he has, under the adjudication of said property to the city of New Orleans, are hereby expressly reserved to him, they not being considered or included in this decree. Plaintiff's demand is rejected, at his costs in both courts, with the reservation stated.

No. 12,149.

STATE OF LOUISIANA EX REL. MRS. H. C. EVANS VS. HON. GEORGE H. THEARD, JUDGE OF THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS.

When the issue between the parties is the interpretation properly to be given to and the effect properly to follow from one of its own opinions and the District Court refuses to decide, the Supreme Court, so as to set matters at rest, will consider on application for writ of mandamus the case as one properly referred to it for immediate action. *Ex rel. Construction Co. vs. Tax Collector, ante*, p. 28.

ON APPLICATION for Writ of *Mandamus*.

Rouse & Grant, for Relatrix.

Respondent Judge in *propria persona*.

W. W. Howe for Executor and Intervenors, Respondents.

Submitted on briefs April 15, 1896.

Opinion handed down May 18, 1896..

Relatrix, the administratrix of the succession of Mrs. Kate Clark Steers, alleges that Mrs. Steers, who was the wife of Schuyler E. Steers, died on the 1st of June, 1888; that her hus-

band died on the 13th December, 1889. That his succession was opened in the Civil District Court for the parish of Orleans, and is now being administered therein, and also in the Surrogate's Court in Otsego county, in the State of New York; that a community of acquets and gains existed between said Steers and his wife; that at the time of her death he was possessed of a large amount of movable and immovable property, and that the succession of Mrs. Steers is a creditor of Schuyler B. Steers for the net half of his estate as it existed at the time of her death; that the executor of said Steers refused to recognize the rights of said succession of Mrs. Steers as a creditor, and that she, in her capacity of administratrix, brought suit against said succession in said District Court for the establishment and recovery of the amount due her; that the heirs of Schuyler B. Steers intervened in said suit and were admitted as parties thereto; that after trial relatrix' demand was rejected and her petition dismissed; that thereupon she appealed to the Supreme Court, which reversed the judgment and remanded the cause to the court below, to be further proceeded with in due course of law; that afterward said cause was placed upon the docket, and after due course, reached and called for trial, but that prior thereto the executor filed an exception, reciting the language of the Supreme Court in its opinion, that the residuary interest in the community of the heirs of Mrs. Steers could only be ascertained by a settlement of the succession in New York and in Louisiana, averring that there had been no settlement in either, and prayed that the question of the settlement of the *residuum*, claimed by relatrix be relegated to some new or further proceeding, or that further proceedings therein be stayed until the settlement of the succession in New York, and the cause being then on the trial docket and fixed for trial, the executor took a rule upon relatrix to show cause why the cause, as fixed, should not be stricken from the docket; said exception and rule came on to be heard and were argued—in consideration whereof the court ordered that the exception be maintained—the rule to strike the case from the trial docket be made absolute, and that the trial of the petition of the intervention and opposition filed by relatrix be stayed until the settlement of the defendant's succession in Louisiana and in New York. In view of the premises, relatrix prayed that this court grant a writ of *mandamus*, directed to the said judge, commanding him to reinstate said cause on his

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docket and to proceed to the trial thereof, and to hear and determine the same in accordance with the rules and practice of said court.

In deciding the case, *Succession of Schuyler B. Steers*, 47 An. 1551, the court used the following language: "The facts in the record do not enable us to issue any decree as the community interest of the opponents (the succession of Mrs. Steers). The partnership, in which the deceased was a member, has not been settled, and there are many outstanding claims against the succession. Nor are we able to issue a decree in relation to the paraphernal funds of Mrs. Steers, alleged to have been converted by her husband. It seems that she received five thousand five hundred dollars from her father's succession, but we find no evidence that it went into the husband's hands. She owned some shares in compress companies, but as these shares were acquired during the community, we are unable to say how or in what manner they were acquired by Mrs. Steers; whether purchased by her with paraphernal funds or given to her by her husband, in payment of paraphernal claims. The residuary interest in the community of the heirs of Mrs. Steers can only be ascertained by a settlement of the succession in New York and in Louisiana."

The decree of the court was as follows:

"It is therefore ordered, adjudged and decreed that the judgment appealed from be avoided and reversed; and it is now ordered, adjudged and decreed that a community of acquets and gains existed in Louisiana between Schuyler B. Steers and his wife, Mrs. Kate Steers, during the period of their residence in Louisiana to June 1, 1888, and that the plaintiffs and appellants, heirs of Mrs. Steers, be recognized as entitled to the residuary interest in the community which would have gone to Mrs. Steers; it is further ordered that the rights of said heirs, opponents and plaintiffs, be reserved as to the paraphernal funds and separate property of Mrs. Steers, alleged to have been converted by her husband and the executor. It is further ordered that this case be remanded to be proceeded with in due course of law, appellee to pay costs of appeal." It is this judgment of the court that is referred to by the parties to the present proceedings.

The opinion of the court was delivered by

NICHOLLS, C. J. An examination of the decree of this court will show that the relatrix had resorted in the District Court to a double

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proceeding, both inside of the succession proceedings. Saville, the executor, had filed a provisional account of his administration, showing certain amounts received and certain amounts disbursed by him. To this account, relatrix filed an opposition, alleging that the executor had failed to account for rents and revenues derived from real estate belonging to said succession and for the share of Schuyler B. Steers in the partnership of which he was a member; she also claimed for paraphernal property of the wife converted to his own use by the husband. The prayer of the opposition was in accordance with its averments.

After filing the opposition, Mrs. Evans brought a separate suit against the executor, alleging the domicile of Schuyler B. Steers and wife to have been in New Orleans at the time of the death of Mrs. Steers. Mrs. Martha Perry and others alleging themselves to be the heirs of Schuyler B. Steers intervened in these proceedings and joined the executor in resisting the claims of Mrs. Evans in her petition and in her opposition, pleading the general issue, but specially admitting some of her allegations and specially denying others. They prayed that her demand be rejected. Mrs. Evans put this intervention at issue by answer. The parties seem to have dealt with the opposition and the direct proceeding as one and the same.

In the body of the decision of this court, in the case, we said: "The most important fact—the only one at issue—that can be determined, is the domicile of Schuyler B. Steers at the time of the death of his wife. Comparing and analyzing the testimony in the record, we are of the opinion that on the 1st day of June, 1888, Schuyler B. Steers had his domicile in the city of New Orleans."

Our decree was predicated upon this finding of fact.

The first question which suggested itself to us, in the present proceeding, was, as to whether relatrix had had recourse to the proper remedy, whether this was not rather a case for an appeal than one for a writ of *mandamus*. (St. Louis National Bank vs. Bloch, 44 An. 895.) We have resolved the doubt existing in our mind on that subject by the consideration that the matter, substantially at issue between the parties, is the interpretation properly to be given to and the effect to properly follow from one of our own decisions.

Relatrix claims that the District Court has given to our decree a

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construction which hampers and impedes the trial of the issues which she seeks to have presently disposed, of to a degree not warranted nor justified by the terms. The District Court admits that in adopting the course it has, it has not attempted to assert or exercise judicial discretion, but that it has acted exclusively upon the hypothesis that all discretion and control over the subject matter had been withdrawn from it, and under an obligation imperatively imposed upon it by our judgment to take no further action. Under the circumstances we think a decision of this matter can be properly referred to us for immediate decision, so as to set matters at rest at once should the court below have misconceived the scope of the judgment. (See *State ex rel. Reynolds and Henry Construction Company vs. O'Kelly, Tax Collector*, 48 An. 28.) We are unwilling to forestall and decide by anticipation any issue between the parties which would legitimately go to the District Court for determination, upon the remanding of the cause. Our decree recognized that a community of acquets and gains existed in Louisiana between Schuyler B. Steers and his wife, Mrs. Kate Clark Steers, during the period of their residence in Louisiana to June 1, 1888, and that the heirs of Mrs. Steers are entitled to the residuary interest in the community which would have gone to Mrs. Steers.

This court has repeatedly held that one who has no legal interest in a succession can not interfere in the administration. (*Succession of DeArmas*, 1 Rob. 461; *King vs. Lastrappes*, 13 An. 582; *Field vs. Mathison*, 3 Rob. 38; *Succession of Floyd*, 12 Rob. 197.) Our decree established as a fact that the heirs of Mrs. Steers had a legal interest in the settlement of the succession of Schuyler B. Steers, and through it the executor has been notified of the existence of such interest. In the administration of the succession he will, even for self-protection, have to act in reference to that fact. (*Succession of Troxler*, 46 An. 738; *Succession of Gaines*, 45 An. 1258.) We were informed through the *mortuaria* brought to this court that it had been opened in the State of New York, as well as in Louisiana, and that the succession had property in both States. We did not decide which was the main or which the ancillary succession. We do not think a decision of that question involved in this litigation is presently before us. There is, unquestionably, a succession opened here with a succession representative and property under his charge. His precise duty is pointed out by

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law. We have, in general terms, referred to it in the succession of Von Hoven, 46 An. 920 and 921, and Succession of Gaines, 45 An. 1238; 46 An. 252. The local interest which the heirs of Mrs. Steers have in the succession of the husband give them an unquestionable right to call upon the executor from time to time to account, to protect their interests from any action taken in the administration by which those interests would be prejudiced, to insist upon a reasonably speedy closing of the succession and to question the correctness of that account when rendered in so far as it might illegally and injuriously affect them. To what extent relief or opposition could go; over what ground it could legitimately extend, in what form, and in what proceeding it should be presented, would depend upon the facts of the particular case, and the circumstances under which it was made. A final account, under and through which the executor should propose to turn over the property and funds left in his hands after a full and complete administration, to the heirs or parties in interest, or an account in which he would propose to make a partial distribution to such parties, would, as we said in the Succession of Conrad, 45 An. 921; Succession of Gaines, 45 An. 1288, and in the Succession of Von Hoven, present a much broader scope for opposition than a provisional account or an ordinary administrator's account, involving a mere payment of certain funds to specified creditors. (See, also, Succession of Thomas, 12 Rob. 217; Wood vs. Stokes, 13 An. 144.) It might well be, however, as the settlement of the community is affected through the administration of the husband's succession, that a surviving wife in community or the heirs of a wife in community have a direct interest in the payments to be made and the funds out of which they were to be taken. All such questions have to be primarily passed upon, in view of existing conditions.

Whether or not the administratrix of the succession of Mrs. Fannie Steers was or was not justified in seeking to have determined the particular issues she was raising on an opposition to an executor's provisional account such as was the one in the matter of which her opposition was filed; whether a partition of the community could be effected through an executor's account, either provisional or final, or whether there should be a direct action instituted between the parties in interest holding matters in abeyance inside of the succession, until the partition was effected; whether the administratrix of

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the succession of Mrs. Steers was or was not the proper person to stand in judgment for a proceeding of that character; whether the institution of the second or direct proceeding by the administratrix, which we have herein referred to, against the executor of Steers, taken in connection with the intervention of the heirs of Schuyler B. Steers in that proceeding and the issue joined on that intervention by the administratrix of Mrs. Steers, constituted or did not constitute a *quasi* partition suit, are questions (as are all similar questions) left open by our judgment to be passed upon, as presented to the District Court in the exercise of judicial power in original actions.

We did not say that the executor of the succession of Schuyler B. Steers should not, at some stage of his *gestion*, account for the fruits and revenues of the real estate, in Louisiana, nor that the administratrix of Mrs. Steers was without capacity or authority to insist that this should be done, nor did we undertake to interfere with the judgment of the District Court, as to the time at which, or the circumstances under which, this should be done. The sentence in our opinion, which the court below believes had the effect of paralyzing its discretionary action, in respect to all these matters, was a mere incidental remark in the body of the opinion going to show the dependence which the administration in one State might have upon that in the other. It might, for instance, be, that community debts should have been presented to the New York executors, and been, by them, paid out of the funds of the separate estate of Schuyler B. Steers in that jurisdiction. Such a fact would, necessarily, have effect upon the rights of parties in the settlement of the community here.

It was not our purpose to convey to the District Court the idea that that fact should control it, or the parties in bringing the succession of Steers in Louisiana to a prompt, full and complete liquidation and settlement, as far as this result could be reached here; that legal proceedings here should be stayed until the New York succession should be closed; or that the heirs of Mrs. Steers should be remitted to New York in order to have the affairs of the community ascertained and fixed in that jurisdiction.

We do not feel authorized, in the present proceeding, to issue a *mandamus* to the District Court, ordering and directing what particular course it should pursue in reference to the succession of Schuy-

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ler B. Steers and the community, as the position it has taken is one based exclusively upon supposed obedience to existing directions to it, under our judgment in the case. 15 S. E. Rep. 99-100-108; 41 N. W. Rep. 748; 104 N. O. 739-742; 24 Am. Law Reg. 531.

We have concluded to direct the District Court to replace the case upon the trial docket, reopen the questions raised upon the opposition and rule, referred to herein, and dispose of them, and the District Court is hereby so instructed and directed.

No. 12,121.

JOSEPH VINCENT, TUTOR, vs. MORGAN'S LOUISIANA & TEXAS
RAILROAD AND STEAMSHIP COMPANY.

48	933
109	48
109	49

Parties having occasion to cross a car track must bear in mind that in the management and business of railroads special trains are liable to be sent forward at any moment, and that the rule that a person before attempting to cross a track must stop, look and listen to guard against danger, is not confined to certain hours of the day or night, nor limited to particular trains.

A PPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

C. H. Mouton and L. O. Hacker for Plaintiff, Appellee.

D. Caffery & Son for Defendant, Appellant.

Argued and submitted April 23, 1896.

Opinion handed down May 18, 1896.

Action by the plaintiff in his capacity as natural tutor of the minor, issue of his marriage with his deceased wife, Rose Olivier, who was killed by one of defendant's trains.

The jury returned a verdict in favor of plaintiff for ten thousand dollars. Defendant appealed.

The opinion of the court was delivered by

NICHOLS, C. J. On the 16th of March, 1893, the wife of Joseph Vincent, the plaintiff, was returning in a buggy to her home near

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Olivier Station, in the parish of Iberia. Accompanying her was her sister and her sister's child. The public road near Olivier (which is a flag station of defendant's road) runs nearly parallel to the company's tracks, but when almost opposite to the station it makes an abrupt turn at or near Veazey's store, and crosses the main track to the other side. The day was cloudy and a strong wind was blowing. Mrs. Vincent was driving. Reaching the turning point in the road she drove directly to the point of intersection of the road with the track, without stopping, and as the horse was crossing the track it was struck by the locomotive attached to a train of cars operated by employees of the defendant company. The horse was killed, the buggy was entirely demolished and Mrs. Vincent (mortally wounded) died a few moments after the accident. The sister and her child, after lingering a short time, also died. The train with which the buggy collided was not the regular passenger, but a special train on inspection duty. It was running just before it passed the intersection of the public road with the track at Olivier Station at about forty miles an hour. The whistle of the locomotive was blown at or near the whistling post, four times, according to custom, and again near the crossing. The bell seems to have been also rung. The appliances of the train were in good condition and the employees of the company at their respective posts. We have examined the record carefully, and the examination so made forces us to the conviction that the verdict of the jury and the judgment based upon it are contrary to the law and the evidence. We have found no fact, either of omission or commission on the part of the company's employees which could give rise to an action of damages against the defendant. We find, on the contrary, that the unfortunate accident, by which the plaintiff's wife came to her death, is directly traceable to heedlessness and want of care and proper caution on the part of the deceased.

Plaintiff's pleadings refer to the train as being a special one, the speed at which it was running as being dangerous, particularly in view of the darkness of the day; to the speed not having been checked as the cars approached the crossing and to obstructions to the view along the line of road from Veazey's store to the crossing. The evidence shows that along the bar fences, between which the public road ran, were a few scattering trees of small size and also some weeds between eighteen inches and two feet high, but

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that they left, none the less, in clear view, any train approaching upon plaintiff's track, particularly to those sitting in an elevated buggy, and that the track itself was raised above the general level of the surrounding country. The approach to the main track from Veazey's store being almost perpendicular, all that a person sitting in a buggy would have had to have done in order to ascertain the exact situation was to have looked to the right across the side of the buggy, if the curtain on that side were raised, or if it were down, to have leant forward a little and looked across. It so happened that the curtain on the right side (the very one which should have been up) had been lowered in consequence of a threatening rain and the persons inside of the buggy, in spite of that fact, drove forward without attempting in any way to guard against possible danger. Mrs. Vincent, the evidence shows, lived near the railroad, had often crossed this identical track, and was familiar with the surroundings. The distance between the store and the crossing was considerable, and furnished ample time and opportunity for examination and discovery, but no precautions, it seems, were taken. In order to reach the track it was necessary to move up an incline leading to the track, but no halt was made when almost the slightest touch upon the reins could have held the horse in check. We are satisfied the track was reached before a suspicion of danger entered the minds of any of the party. Did the simple fact that the hour for one of the regular trains had passed and that for the other had not been reached warrant the belief that no train was likely to pass? It has been held that it does not; that parties having occasion to cross a track must bear in mind that, in the management and business of railroads, special trains are liable to be sent forward at any moment, and that the rule that a person before attempting to cross a track must stop, look and listen to guard against danger is not confined to certain hours of the day or night, nor limited to particular trains. A railroad track of itself has been held to be a warning of danger. *Hinken vs. Iowa Cent. Ry. Co.*, 66 N. W. 883.

Plaintiff, in respect to the obstruction alleged, overlooks the fact that if such obstructions really marked the view that they themselves were as much concealed from the view of the defendant's employees as the latter were from the persons in the buggy, and that the very fact of the existence of the same imposed additional caution

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upon parties approaching the track. Beach on Contributory Negligence, p. 203, Sec. 65; Patterson's Railway Accident Law, Sec. 177.

We do not understand plaintiff's allegations as charging that the employees of the railroad saw the approaching buggy, or that by the exercise of such reasonable care as was consistent with their duties they might have seen them any sooner than they did. Their allegations as to the difficulty under which they themselves labored in seeing surrounding objects by reason of the misty cloudy weather and the intervening trees and weeds negative the idea of such a claim having been advanced on their part against the defendant as a cause of action. There is no attempt to show that defendant's employees failed in their duty from the moment the danger was seen up to the time of the accident, nor is there any charge that the defendant was in fault in respect to any of the appliances connected with the train. Their real contentions are that the whistle was not sounded, the bell was not rung, the train was moving at a dangerously fast rate, and its speed was not slackened as the cars approached the crossing. The signals, as we have said, were properly given, but they were not heard—possibly because the wind was high; possibly because the ladies in the buggy had their hats on, covered with their veils; possibly because engaged in conversation and apprehending no danger they gave no heed to what was passing around them. We have no reason to suppose that the accident would have been avoided had the train been moving at a slower rate than it was—it is not so charged. It is referred to as having been dangerously fast. Plaintiff charges that the employees of the defendant had no right to move the train at as fast a rate as it was going on a misty and windy day, and knew, or must have known, of the danger of a collision. We do not find that the train was moving at a faster rate than that at which passenger trains frequently move between regular stations. Olivier was only a flag station, and this particular train had no reason to stop there, or to expect that it would be stopped at that point. The evidence does not show such a condition of things as the allegations charge—the day was dark and somewhat misty and a rain was threatening, but the hour was just after noonday, and all objects were visible. The evidence discloses the existence of no fact outside of the alleged fact itself that the wind was high and the day was not bright, tending to show that it was the engineer's duty to slacken the speed at which the train was moving.

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It has been said in other jurisdictions that trains must be run with speed on dark nights and on misty days, and that doing so raises no inference of negligence in the absence of special facts going to call for particular precaution. *Omaha R. R. Co. vs. Wright*, 66 N. W. 842. Trains are run by schedule, one train conforming itself to the movements of the others, and it would be a dangerous rule to establish that weather conditions in one particular neighborhood should control and regulate the speed of the trains in a special vicinity. It is not shown that the lane at Olivier crossing is a much frequented crossing, or that there were grounds for supposing that persons proposing to cross there would not be governed by ordinary rules of caution and prudence.

Appellee presses upon us that the fireman was firing up, as he reached the whistling post, and that he should not have been doing so, but should have desisted until the crossing was passed. That if he had been looking out on the left of the cab he would have seen the buggy approaching the crossing sooner than he did. The fact that the fireman was engaged in putting in coal as the train approached the whistling post was a fact shown by his own testimony and was not looked to or assigned as furnishing any ground of complaint in the pleadings as we have said. There was no attempt to show that in firing up at the time he did, he was not at that time doing exactly what was necessary to be done in the line of his duty. If he had been looking out at that time there would have been nothing to indicate, so far as we see from the evidence, that the parties inside the buggy would attempt to cross over the track directly in front of a train rapidly approaching them and directly visible to them had they looked.

We are of the opinion that the deceased was guilty of such contributory negligence in this case as to cut off the claim for damages.

For the reasons herein assigned, it is hereby ordered, adjudged and decreed that the verdict of the jury and the judgment appealed from, based therein, be and the same are hereby annulled, avoided and reversed; and it is now ordered, adjudged and decreed that plaintiff's demand be rejected with costs, in both courts.

Hebert vs. Mayer and Sheriff.

48 938
116 989

No. 12,145.

GILBERT HEBERT VS. GEORGE L. MAYER AND SHERIFF.

The protection of the family is the principal object of exemption laws. It secures a place of residence which the debtor may improve and make comfortable, and where the family may be sheltered beyond the reach of financial misfortune.

Hence, the exempting statutes should not be too strictly construed.

Prior to the debt for which he was seized and continuously since, the debtor was the head of a family and contributed to their support.

A PPEAL from the Tenth Judicial District Court for the Parish of Avoyelles. *Coco, J.*

W. Hall and E. J. Joffrion for Plaintiff, Appellee.

A. J. Lafargue and H. C. Edwards for Defendants, Appellants.

Submitted on briefs May 19, 1896.

Opinion handed down June 1, 1896.

The opinion of the court was delivered by

BREAUX, J. The exemption claimed by the plaintiff existed prior to the Constitution of 1879, under the law of 1865.

To retain the right of homestead (under the provisions of the latter) the former required dedication as a homestead by the owner, by a public notice in conformity with statutory direction.

The record shows that the plaintiff complied with the condition precedent, to the right to claim exemption, by recording his declaration.

The defendants challenge the correctness of the declaration, to the extent only that the plaintiff claimed to have been the head of a family and that he had some one dependent upon him for support. This case has been twice before us on appeal. *Hebert vs. Mayer*, 47 An. 563. The question is now limited to whether there was any one dependent for support upon the plaintiff within the intendment of the law securing exemption? The ownership and occupancy of the property by the debtor are not questioned. The claim is that he, the debtor, was not the head of a family and had no one dependent upon him for support.

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The relations between plaintiff and his wife, colored, date from the last days of slavery in this State. He is a negro. He testifies that children were born to them prior to their marriage in 1869, and several since. His first wife died many years ago. He reared the children. They stayed with him until their marriage, and they were dependent upon him for support.

One of the offspring died, leaving a son. He was taken to the house of the plaintiff, his grandfather, and he also was reared to manhood on the property claimed as a homestead.

The plaintiff was married a second time, in 1892. To the date of this marriage there may have been gaps in the dependence of the children and grandchild. The evidence upon this point is somewhat conflicting. Its weight sustains the claim of support, at all times. Granted, that there were short periods of time in the many intervening years during which the dependence of a member of the family was not shown to have been direct, the exemption is not thereby lost. If, considered as a whole, the head of a family has reared a family who were dependent upon him for support, the exemption remains, if as in this case there were dependent members of the family on the day of the seizure of the property by the creditor and the dependence has every appearance of having been continuous from the first.

Here, at the time the debt was created, the plaintiff was a married man and the head of a dependent family.

While it is true that the debtor must be the head of the family or have some one dependent upon him for support—one to whom he owes support as a moral duty, the law in its humanity does not seem to contemplate that the homestead exemption shall cease immediately after the death of the dependent member of the family, or shall cease because a dependent member of the family has become old enough to earn something toward the support of himself and the parent by whom he has been reared.

The exception of the homestead rests upon the theory that the obligation to support the person to whom support is due is a higher obligation on the part of the debtor than the payment of his debts. It is of such a high character that it must have a continuing effect for a short time, at least, after the head of the family no longer has some one to support.

The purpose, evidently, was to secure a "Home" beyond the

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reach of financial misfortune, around which gather the affections of the family; the greatest incentive to virtue, honor and industry.

Entertaining this view of the purpose of the statutes, if the propositions advanced by the defendants were supported, as contended, by the evidence, the plaintiff would none the less have a right to the exemption he claims.

The evidence supports the good faith of the plaintiff. We mean by good faith that nothing shows that members were brought within the household for the purpose of avoiding the payment of his debts. The design manifestly is that the debtor shall not obtain credit as owner of property subject to execution and afterward withdraw it by converting it into a homestead. This does not seem, at any time, to have been plaintiff's purpose.

The judge who tried the facts in the first instance found that plaintiff was entitled to the exemption. We agree with his finding.

It is therefore ordered and decreed that the judgment appealed from is affirmed, at appellants' costs.

No. 12,100.

HENRY OTIS VS. JAMES SWEENEY.

A general allegation in a petition of a threatened injury, without any announcement as to what the supposed injury will result from or as to what it will result in, is totally insufficient to justify an injunction.

APPPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

W. S. Benedict and J. J. McLoughlin for Plaintiff, Appellant.

T. M. Gill for Defendant, Appellee.

Argued and submitted May 6, 1896.

Opinion handed down June 1, 1896.

In December, 1885, the plaintiff filed a suit in the District Court for the parish of Orleans, in which he alleged that he was the owner of twelve certain lots of ground in the city of New Orleans, which he described, together with all the buildings, improvements, rights, ways, privileges and appurtenances thereunto belong-

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ing, especially all right of alluvion or accretions of batture appertaining thereto; that he and the authors of his title, through whom he claims by subrogation and warranty, had been in continuous and uninterrupted possession thereof for over one hundred years, and he was then in possession of the same; that by reason of his ownership of said property on the river bank and of the batture in front of said property he had the right to build wharves, cluster pilings, or any other constructions in front of said property and to use the same when so constructed; that he constructed a wharf in front of said property, as he had a legal right so to do; that defendant threatened to interfere with the rights of petitioner in the property on the premises, under and by virtue of a contract claimed to have been made between him and the city of New Orleans; that said contract was illegal, null and void for various reasons.

An injunction issued under an order of the District Court, following the prayer of the petition to a certain extent, but enjoining specifically the defendant, Sweeney, from interfering with the plaintiff, Otis, in the mooring of his rafts and other water crafts to the wharf he had built in front of his property. Defendant interposed an objection of *res judicata*, based upon the pleadings and judgment in the case of James Sweeney vs. Henry Otis, No. 7368 on the docket of the Civil District Court, and further excepted that the Civil District Court was without jurisdiction and wholly incapacitated to grant the injunction nor in any manner to entertain the suit of the plaintiff; that the writ of injunction was in violation of Art. 11 of the State Constitution; that there was neither a cause of action nor a cause for an injunction set forth in the plaintiff's petition.

On the 25th of February, 1891, the District Court rendered a judgment sustaining the exception of *res judicata* and dismissing the suit; on appeal to this court the cause was remanded. Otis vs. Sweeney, 43 An. 1073.

The exceptions having been tried a second time and submitted, the District Court excluded the evidence offered by plaintiff, sustained the exceptions, dissolved the injunction and dismissed the suit, and plaintiff again appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. In the present case the District Court passed not only upon the exception of *res judicata*, but also upon the other ex-

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ceptions filed by defendant. These exceptions refer not only to the demand proper, but to the injunction which accompanied it. A very considerable portion of defendant's brief is taken up in discussing the proposition that the District Court was without power or authority to enjoin defendant from bringing suits against the plaintiff Otis, predicated upon the contract which he had with the city. This discussion assumes a broader scope to the injunction than its terms warrant. It is not to be supposed that the District Court would have attempted to restrain defendant from claiming judicially what he believed himself entitled to in view of the decisions of this court in *Butchers' Benevolent Association vs. Cutler*, 26 An. 500; *Brott vs. Eager, Ellerman & Co.*, 28 An. 262; *State ex rel. Sweeney vs. Judge*, 39 An. 621, and *State ex rel. Sweeney vs. Voorhies, Judge*, 40 An. 1. General as are the terms of the injunction they do not extend as far as defendant supposes them to do. In view of this fact it is unnecessary to consider the injunction from that standpoint.

Defendant's exception that plaintiff's petition discloses no cause for an injunction and that it should be dissolved is substantially a motion to dissolve on the face of the papers. We find no allegation in the petition which, in our opinion, would call for an injunction. Plaintiff alleges that "the defendant threatens to deprive petitioner of the use of his property, disturb him in the actual and real possession which he has had for more than one year, and of his rights of possession, ownership and enjoyment thereof, and thus deprive petitioner and impair the rights granted to him under the laws and Constitution of the United States and of the State of Louisiana, "but there is not one single word in the whole petition going to explain or to specify what the threats of the defendant were, to which he alludes, or what they cover. He says that the defendants threaten to interfere with his rights in the property described in his petition, under a contract with the city of New Orleans, which he declares to be inoperative, null and void as to him, but in what manner this interference is to be made or in respect to what particular right this interference is expected to take place, we are left completely in the dark. A general allegation of a threatened injury without any announcement as to what the supposed injury will result from, or as to what it will result in, is totally insufficient to justify an injunction. No issue is raised by plaintiff's petition. Defendant does not know either what he is expected to assert

Otis vs. Sweeney.

or what he is expected to resist. Plaintiff asks that Sweeney be enjoined from doing a great many things without alleging that he has ever advanced any claim to do the things which he seeks to have him prohibited from doing. We find a prayer for a judgment for twenty-five hundred dollars damages, without any direct allegation that he has been injured or damaged, and without any attempt to explain what the facts were from which injury or damage arose, nor what the injury or damage complained of is. The claim for injury and damages, as it appears in the pleadings, is without any basis on which to rest. The injunction, in our opinion, was properly dissolved. The objections to the pleadings, which we have considered above from the standpoint of an injunction, apply also to the demand proper which plaintiff has filed. It is impossible for us to ascertain from the petition the subject matter or the ground of his complaint. The only affirmative act set forth as having been done by the defendant, from which we could imagine damages could arise, is the institution by him against the plaintiff of thirty-two suits. Assuming that the bringing of a multiplicity of suits by a plaintiff against the same defendant could give rise to a claim for damages against the plaintiff bringing them, neither malice nor want of probable cause, nor want of legal right to bring the suits has been charged in this instance against the defendant. We do not regard the claim for damages as a real claim. Plaintiff has no interest in attacking defendant's contract with the city of New Orleans, unless he can connect himself legally with the right of attack and trace some injury to himself from the contract. If we throw out of consideration plaintiff's claim for twenty-five hundred dollars we find no allegation of injury in the petition to support the present suit.

This conclusion having been reached, the exception of *res judicata* passes out of the case. We are not called on to say whether the judgment of the District Court in the case of Sweeney vs. Otis determined not only for the purposes of that particular demand and that particular court the right of Sweeney to collect wharfage against Otis as against the particular defences set up by the latter, or whether it would only serve in that court as a precedent for other cases of a similar character which might be brought. The District Court has no superior limit to its jurisdiction, and it had power and authority to pass upon the question of the nullity of Sweeney's contract, or the scope of that contract, had such questions been before it by di-

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rect action. In the particular case referred to the question was presented purely as a defence, and was passed upon incidentally and collaterally, in order to reach a conclusion and decision upon the liability of Otis to Sweeney for an amount of two hundred and fifty-six dollars for wharfage dues predicated upon a right claimed by Sweeney under a contract with the city of New Orleans.

The appeal to the Court of Appeals was dismissed, as we have already stated.

A discussion of this subject will be found in Wells on *Res Judicata*, Chapter XVI, subdivision "Directness of the Issue in the First Action," and alluded to in Succession of Winn, 30 An. 702; *State ex rel. Pugh vs. Judge of the Twentieth Judicial District*, 33 An. 1385, and Succession of Winn, 33 An. 1396; *Vinet, Executor, vs. Bres & Richardson*, recently decided.

The judgment appealed from is hereby affirmed.

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No. 12.136.

THE TEXAS & PACIFIC RAILWAY COMPANY VS. P. B. COMPTON
ET AL.

The plaintiff having by injunction sought to restrain the parochial authorities from so altering the route of a public road as to cross its track and right of way against its will, without making any demand for damages or other compensation, this court is without jurisdiction *ratione materie*, and the appeal must be dismissed on the motion of the appellees.

APPEAL from the Tenth Judicial District Court for the Parish of Rapides. *Andrews, J.*

— — — — —
M. C. Moseley, for Plaintiff, Appellant.

— — — — —
Phanor Breazeale, District Attorney, and *L. J. Hakenyos* for Defendants, Appellees.

— — — — —
Argued and submitted May 18, 1896.

Opinion handed down June 1, 1896.

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ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

WATKINS, J. This is a suit by the railroad company to restrain, by injunction, the parochial authorities of Rapides parish from inter-

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fering with its roadbed, track and right of way, which form part of its property and franchises, by crossing and traversing same by a public road or thoroughfare to its great inconvenience and in violation of its rights and against its expressed wishes.

Its declaration is that there is at present, and has for a great while existed, an adequate and sufficient public thoroughfare, in use by the public, which runs parallel with its roadbed and track, at the point designated, and that no other is necessary for any purpose. That on account of said highway having been permitted to fall into a bad condition and to become unsuited for a public thoroughfare, through the failure of the parochial authorities to keep it in repair, the defendants have conceived the idea, and undertaken to carry same into effect, of so changing the route of said public road as to make it traverse or cross its track at two different points, in close proximity to each other, and that same are unnecessary, will be expensive to the company and an impediment to the free use of its tracks, and will increase the chances of accidents and consequent injuries to the passers by the thoroughfare.

After answer filed and trial, there was a judgment rendered in favor of defendants, and the plaintiff has appealed.

Notwithstanding great elaboration of detail, there is no moneyed demand in the way of damages, either present or prospective, contained in either of plaintiff's petitions, and no property right of any kind for which a judgment is requested. The suit presents a controversy as to the right of the defendant, in reconstructing and changing the route of a public road, to pass same over its right of way. In the nature of things, the value to the plaintiff, of this right of servitude of way, is of inconsiderable value in dollars and cents.

It is apparent that a judgment of this court, in favor of either plaintiff or the defendant, would not involve anything or right of the value of two thousand dollars; and it is therefore evident that this court has no jurisdiction *ratione materiae* of the matter in dispute, and, consequently, plaintiff's appeal is dismissed.

Villavaso et al. vs. Their Creditors.

No. 12,185.

W. N. VILLAVASO ET AL. VS. THEIR CREDITORS.

The purchase by the lessors at the syndic's sale of the right of occupancy of the leased premises, subject only to their claim for unpaid rent, does not cancel the lease with respect to rent paid by the application of the proceeds of movables subject to the lessor's privilege, and brought by them at the sale. The case is discriminated from *Bartels vs. Creditors*, 11 An. 483. See also 14 An. 218; 17 An. 174; 37 An. 587; 39 An. 743; 40 An. 267.

Such a purchase binds the lessor only for the amounts bid for the right of occupancy and cancels the lease so far as respects the unpaid rent. C. C., Art. 2217 *et seq.* *Ibid.*

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Frank L. Richardson for Syndic, Appellant.

Frank N. Butler and *Frank N. Butler, Jr.*, for Daniel Breen and others, Opponents, Appellees.

Horace E. Upton and *Anatole A. Ker* for Briede and Dittmar, Opponents, Appellees.

H. G. Dupré, Attorney for absent creditors, Appellee.

Argued and submitted May 9, 1896.

Opinion handed down May 18, 1896.

The opinion of the court was delivered by

MILLER, J. This controversy is before us on the appeals of the syndic and of creditors of the insolvents from the judgment of the lower court on the opposition to the syndic's account.

The property surrendered mainly consisted of the insolvent's stock of goods in leased premises, the leases having long periods to run, and the rents to become due under these leases exceeding the value of the stock. At the sale ordered by the court the lessors became the purchasers of the stock, retaining the amount of their bid on account of the rent due and to become due. Crediting these purchases there remained the liability for the unexpired portions of the

lease; to Briede, one of the lessors, nine hundred and twenty-six dollars, and to the other lessor ten hundred and fifteen dollars. The leases stipulated that any default by the lessors should mature the amount of the rent for the full term, and this was doubtless, the reason the syndic permitted the lessors to retain the proceeds of sale instead of receiving from the syndic the monthly rent as it became due. In this condition, under the order of the court the syndic offered for sale the right of occupancy of the premises for cash, the purchaser besides to assume the amounts to become due under the leases, that is, nine hundred and twenty-six dollars on the lease from Briede and ten hundred and fifteen dollars on the lease from Ditmar. At the sale, Briede bought the right of occupancy of the store he had leased, for the price of two hundred and ninety dollars, or six dollars and seventy-five cents for the forty-three months the lease had to run, and Ditmar bid one hundred and sixty-four dollars, or three dollars and fifty cents for the same number of months his lease had to run. The syndic then filed his account. His theory seems to have been that Briede by his bid became the debtor for two hundred and ninety dollars for the right of occupancy, and for the assumption of nine hundred and twenty-six dollars for the unexpired term of the lease, and that Ditmar became debtor for one hundred and sixty-four dollars for the right of occupancy and one thousand and fifteen dollars for the assumption of the rent for the unexpired portion of his lease. These so-called assumptions, it will be perceived, were of amounts which, if they became due, would have been demandable by the lessors, the purchasers. By charging the lessors with the proceeds of the property bought by them, and with the amount of their bids, and by credits for the rents, the syndic placed Briede on the tableau as a debtor for six hundred and thirty-two dollars, and Ditmar as a debtor for one thousand one hundred and seventy-nine dollars. This brought oppositions from both, in effect insisting they could not be charged with the assumption of rent accruing to themselves, and maintaining all they owed was the bids for the right of occupancy. There was an opposition from creditors, claiming that the purchase of the right of occupancy by each lessor canceled his lease, and hence that the amounts derived from the sale of the stock in the leased premises and retained by the lessors should be placed on the tableau for distribution. The judgment of the lower court main-

tained the oppositions of the purchasers to charging them with liability for the assumption of rent, dismissed the opposition of the creditors, asserting that the proceeds returned by the lessors should be taken from them and distributed to the creditors, and directed some unimportant modifications in the account, and the controversy is, as already stated, here on the appeals of the creditors and syndic.

The leading proposition discussed is the effect of the purchase by the lessors of the right of occupancy of the leased premises. It will be readily understood that by the purchase of a lease by the lessor, he becomes lessor and lessee, and as he can not owe rent to himself, confusion takes place and the lease is extinguished. If the lessors in this case had bought the lease they could not have demanded rent from the syndic for the unexpired terms. Civil Code, Arts. 2217 *et seq.*; *Bartels vs. Creditors*, 11 An. 433. In this last case the lessor, manifestly contemplating no such result as losing his rent of the premises leased to the insolvent, made an unqualified bid for the lease offered by the syndic for sale. The court held the purchase forfeited all claim of the lessor against the syndic of his lease for rent for the unexpired term, and the lessor owed his bid besides. This hard condition led to the dissent in that case, that the lessor did not lose the rent, because he had not by his purchase expressly assumed that rent. It is clear this decision has no application to this case, in which there has been no purchase of a lease, and no assumption of any rent, except to the extent to be noted further along, exerting no influence on the proposition of the opponents. Here, the purchase was simply and only of the right of occupancy subject to the rent unpaid, nine hundred and twenty-one dollars and one thousand and fifteen dollars. The *Bartels* case has been followed by other decisions, and these as well as other cases exhibiting phases of the question have had our attention. Thus it has been held that the lease is canceled when the premises are subsequently destroyed, or when by the act of the lessor the lessee is deprived of possession, and the effect of the purchase of the lease by the lessor has been considered and the same conclusion reached as in the earlier cases of *Young and Bartels*. *Brinton vs. Bates*, 17 An. 174; *Lehman vs. Dreyfus*, 37 An. 587; *Schwartz vs. Saiter*, 40 An. 287. But it seems to us that none of these decisions support the contention of the opponent, that the lessors by their purchase of the right of

occupancy, subject only to unpaid rent, forfeited their right to rent practically paid to them, recognized by the account filed and impliedly by the order and advertisement under which the lessors bought and by which their obligations are to be measured. The difference between buying a lease and purchasing the right of occupancy merely was drawn in *Walker and McVean vs. Dohan*, 89 An. 743. We find no warrant to hold that the purchase of the privilege of occupancy offered, with no reference to liability under the lease, imports any obligation on the part of the purchaser except to pay his bid. In this case this view finds additional support in the order of sale, the advertisement and the circumstances under which the right of occupancy was offered. The rent for the full term of the leases, except the residue of one thousand and fifteen dollars and nine hundred and twenty-six dollars, had been provided for the sale of the stock subject to the lessors' privilege, the proceeds retained by the lessors and carried on the account as applied on the rent. The right of occupancy, subject only to the remnant of rent to become due, was an asset of the insolvency. That asset it was proposed to realize. Hence, the petition, the order and advertisement for the sale of the right of occupancy for cash, free from all claims except the unpaid rent. The fair import of these terms was that the syndic offered the right subject to the encumbrance stated. If the lessors bought, they assumed or bought subject to the rent due themselves. If a third person bought, it was subject to the lessor's unpaid rent, to be paid them when it became due. Nothing was to come to the syndic except the bid for the right of occupancy. Neither under the law without the terms, or under the terms, is there the basis to hold the purchasers bound to restore the proceeds applied to pay the rent, and in view of the well-defined terms constituting their contract, to hold them liable for more than two hundred and ninety-four dollars bid by one, and one hundred and sixty-four dollars bid by the other would be simply to create an obligation not arising under the law, never contemplated or resting on any consent express or implied. The opposition of the creditors seeking to charge the purchasers with the proceeds of sale of the stock was therefore properly sustained.

Undoubtedly, the purchase subject to their own claim for unpaid rent canceled that demand. That effect was wrought both by the

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law under the principle of the Bartels case and the express assumption, an element lacking in that case. *Bartels vs. Creditors*, 11 An. 486. After that purchase the syndic owed them nothing; they had been paid, except for the residue unsatisfied, but that was canceled by their purchase. Nor did they owe anything under their bid, except the amounts bid for the right of occupancy. We can therefore find no basis for the charge against them in the account of the unpaid rent due to themselves. Buying subject to their own claim for rent did not make them debtors to the syndic for the rent. The opposition to being charged in the account with amounts due themselves was properly sustained.

We have stated our conclusions; the lessors owe to the syndic the amounts bid for the right of occupancy, that is, two hundred and ninety dollars and one hundred and sixty-four dollars. With this modification charging them with these amounts the judgment of the lower court, which includes the direction for a new account on the lines of the decision of the lower court and of this opinion, is affirmed.

No. 12,098.

JOSEPH HENRY ET AL. VS. BRACKENRIDGE LUMBER COMPANY,
LIMITED, ET AL.

Indirect allegations that the officers of a corporation against whom suit has been brought "had failed in their duty in certain respects," and "had not taken due precautions to ascertain the fitness of an employee before placing him in charge of dangerous machinery," are insufficient to charge such officers with liability, when it is not alleged what part, if any, said officers were called on to take in the premises within the scope of the duty imposed upon them by virtue of their office, and wherein they had failed in the performance of such duty. The mere fact of an accident does not carry with it a presumption of negligence. The facts and circumstances connected with the accident must be shown so as to enable the court to trace results to definite causes.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Benjamin Rice Forman for Plaintiffs, Appellants.

Dart & Kernan for Defendants, Appellees.

48	950
108	167

48	950
e114	279
e114	812

48	950
119	577

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Argued and submitted April 21, 1896.

Opinion handed down June 1 1896.

Plaintiffs, the father and mother of George E. Henry, deceased, claim from the defendant corporation, and its officers and agents, Edward F. Brackenridge, its president; Charles E. Brackenridge, its treasurer; V. A. Longacre and James J. Green, its foreman and superintendent, the sum of twenty-five thousand dollars. That about April 17, 1895, their said son, a lad of about sixteen years of age, employed by defendants in their factory, was, by the carelessness and negligence of said defendants, horribly mangled, and after suffering great pain and agony of body and mind, he died from the injuries then and there received, and that the defendants were at fault and negligent at the time of the injury and killing of the son of petitioners, which fault and negligence caused his injury and death. (1) In having their factory where he was employed and at work constructed in a defective and dangerous and unskilful manner; there was not a sufficient space between the floor and the shaft, nor between the shaft and the roof; nor between the floor and the roof; the machinery and appliances defective and in bad order and repair; a gum belt in bad order and repair was used when a leather belt in good order would have been safer; ordinary prudence and a proper construction would have required a support for the belt so as to lift it off the shaft when being repaired; proper prudence and care required that the shaft should have been stopped while the belt was being repaired and placed in position; dangerous machinery of this character should have been placed in charge of a competent mechanical engineer, but the defendants had failed in their duty in all of the respects above stated and had employed to have charge of said machinery said James Green, who was not a mechanical engineer and was grossly incompetent and unfit for his position, and the other defendants were at fault in not taking due precautions to ascertain his fitness before placing him in charge of such dangerous machinery, and this they did out of parsimonious economy; the said George E. Henry was without fault or negligence on his part at the time he was injured and ignorant of his danger and an inexperienced youth when he was ordered by said Green (his superior) to hold the belt

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while he (Green) laced it, when the shaft and other machinery was still in motion and revolving at a highly dangerous rate of speed, when by reason of the fault and negligence above detailed, the belt being of gum, and it and the machinery being then and there in bad order and repair and the space being too short, and all these things combined with the ignorance and carelessness of Green in placing an immature boy in so dangerous position when the shaft was rapidly revolving at a highly dangerous rate of speed, the gum belt caught on and was twisted on the rapidly revolving shaft, threw the said George E. Henry with great violence against the roof and mangled and crushed his body, so that suffering great agony, he died. In order to suppress and conceal the evidence of their carelessness, the defendants destroyed his shoes and clothing; they could have prevented the said injury and did not do so. The other named defendants were the vice principals of the corporation and by their fault and negligence as above described petitioners have been damaged in the said sum for which they prayed judgment *in solido* against the defendants.

Edward F. Brackenridge, president; Charles E. Brackenridge, treasurer; V. A. Longacre, secretary, and James G. Green, secretary and superintendent of the Brackenridge Company, excepted to the petition on the ground that nothing therein said or averred showed any cause or reason for making them parties to the suit; that on the face of the papers, and, in fact, they are officers and agents of the corporation, and therefore, they are improperly made parties. They further excepted that the petition disclosed no cause of action against them.

The defendant corporation answered, first pleading the general issue. Further answering they averred that it was true that George E. Henry was employed by respondent in its factory at and about the time set out in the petition and that he was accidentally killed, but said Henry was a boy of strength and of intelligence and able to perform the duties assigned to him; that he was not a child, nor an infant, and was well acquainted with the factory and its operation and that the unfortunate injury by which he lost his life was due entirely to his own carelessness and culpable contributory negligence on his part, and not in any manner to the fault, negligence and carelessness of respondent.

On the trial of the exceptions they were sustained as to E. F.

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Brackenridge, Charles E. Brackenridge and V. A. Longacre, and the suit as to them dismissed, but they were overruled as to James G. Green.

Green then answered, pleading the general issue. The case was tried before a jury, which returned a verdict in favor of the defendants. Plaintiffs, after an unsuccessful attempt to obtain a new trial, appealed from the judgment of the court, sustaining the exceptions as to certain of the defendants, and also from the judgment on the merits.

ON THE JUDGMENT SUSTAINING EXCEPTIONS FILED ON BEHALF OF
THE PRESIDENT, TREASURER AND SUPERINTENDENT OF THE
DEFENDANT CORPORATION.

The opinion of the court was delivered by

NICHOLLS, C. J. Appellant has practically filed no brief on his appeal from the action of the court, sustaining the exceptions filed by the president, the treasurer and the superintendent of the company, but have contented themselves with saying that the authorities cited by the District Judge should have led up to a ruling directly the reverse of that which was made. We think the ruling correct. The petition fails to show what part, if any, these officers were called on to take in determining the construction of the building or its accessories, in fixing the character of the appliances, or in controlling the appointment of Green, as foreman of the company. It is not alleged that these matters fall within the scope of the duty of any one of them. Indirect allegations that "they had failed in their duty in all of these respects," that "they had not taken due precautions to ascertain Green's fitness before placing him in charge of such dangerous machinery" are totally insufficient to charge them with any liability in respect to the matters complained of.

The charter of the company is not annexed to plaintiffs' petition, and we know nothing of the duties assigned by it to these different officers. The judgment is affirmed.

ON THE MERITS.

This case comes to us on an appeal by plaintiffs from a judgment against them based on the verdict of a jury. We have examined the record and find no ground upon which we could reverse it.

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Plaintiffs' petition contains many allegations as to the defective construction of the building and its different parts, and as to the improper character of the appliances, and evidence was introduced endeavoring to sustain the same, but the conclusions we have reached do not call for any expression of opinion in respect to the same, for let their condition be what it might, such fact would not enter as a factor in the case, unless it should appear that the injury received was the result of the same. *Nivette vs. New Orleans & Lake Shore Railroad Company*, 42 An. 1158; *Clements vs. Electric Light Company*, 44 An. 694; *Snider vs. Railroad Co.*, 48 An. 11. The mere fact of an accident does not carry with it a presumption of negligence or fault. The facts and circumstances connected with the accident must be shown so as to enable the court to trace results to definite causes. This has not been done in this case. We are unable to say how the accident occurred. The only person who seems really to have had any knowledge of it at all is the foreman Green. Though he was so excited and matters occurred so suddenly as to render his account not thoroughly reliable in all respects, yet it is clear and positive on certain points, and those negative the condition of things on which plaintiffs base their action. Plaintiffs' contention is that the deceased, an inexperienced youth, was directed by his superior Green, the foreman of the establishment, to hold a certain belt, as he, Green, laced it, while the shaft and other machinery was still in motion, revolving at a highly dangerous rate of speed—that the deceased, ignorant of the danger, obeyed; that the belt being of gum and in bad condition, it caught on the shaft and was twisted around it while rapidly revolving, throwing deceased, with great violence, against the roof, in consequence of the space between the shaft and the roof being so short as not to permit the passage of his body without striking. It is very evident, from the allegations of the petition itself, that the plaintiffs did not know themselves in what manner and under what circumstances the deceased became caught or entangled in the belt, for there was no attempt in the pleadings to set out the facts connected therewith, and they were left to be elicited, if possible, by the evidence. Green positively denies that he had either ordered the deceased to help him lace the belt or that he, in point of fact, did so; he says there was no need of his helping him, "for if he had been holding it, witness could not have laced it; if he had been holding it

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he would have borne it down on the shaft, and he (witness), could not have laced it." He says that the belt, needing to be laced, he sent the deceased for a piece of lacing, and on his handing it to him he ordered him to remove some shavings which had accumulated around the particular machine he was in the habit of feeding; that he himself hung the belt free from the shaft and laced it tight himself; that he then reached over and put it on the side of the pulley to throw it on, when in some way Henry got his hand on it and the result followed.

He says the thing occurred so quickly that he could not account how in the world he got his hand in it; he must have grabbed it in some way. That Henry was standing on the opposite side where he feeds the machine at which he works. It is plain that the deceased got entangled in the belt and was carried up by it to the shaft and that his body was repeatedly struck as it passed between the shaft and the roof, but the weakness of the case consists in no one knowing how he came to be so entangled. His duty did not call him to the belt or near it. Green's statement is extremely indefinite, but such as it is it is the only direct testimony on the subject. Discrediting it, striking it out, we have nothing left (*Ferguson vs. Tarbox*, 44 Pacific, 905). We have no reason to believe that the building with its accessories was not suitable for carrying out the purposes for which it was designed. It could scarcely be expected that those who constructed it should have done so with reference to the possibility of a human body being carried up and around a revolving shaft and that they should have left a larger space between the roof and the shaft than they did for the purpose of enabling a body to pass without being struck, nor have we reason to suppose that the belt, assuming it to have been precisely in the condition which plaintiffs claim it to have been in, could not have been safely used for months in the work for which it was designed. As no one would anticipate that it would slip off from the upper pulley and that just as it did so a heavy weight should be suddenly thrown upon it, no one would guard against that special contingency. We think the testimony shows that plaintiffs' claim that the machinery should be stopped in a factory while belt connections between some of the smaller shafts in the establishment are being made, is unreasonable. We think that the question as to what appliances are best to be used to guard against accidents while belts are being laced does not affect this case,

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as the belt had already been laced and was being put on when the accident occurred.

It is not shown that any special scientific skill was needed in the discharge of the kind of work with which Green was entrusted. The evidence shows him to have been engaged about machinery for a number of years, with practical knowledge of his duty. He had been in the employ of this company for a long time and no accident of any kind prior to the one we are now called on to deal with is charged to have occurred during his administration—no failure of duty by him, either by way of omission or commission, has either been established or attempted to be established.

The accident was a deplorable one, but we do not think that defendants are responsible for it.

The judgment is affirmed.

No. 11,960.

LEON J. CARROLL VS. SUCCESSION OF D. R. CARROLL AND CHARLOTTE
L. CARROLL, AND THE HEIRS THEREOF.

Collation is based upon the theory, that the person collating has withdrawn from the parent money or property which otherwise would have gone to swell the mass of the succession; it can not apply to amounts which had never been actually received; so where it is shown that a father in a marriage contract declared that he then and there settled a certain amount of dowry upon his daughter, and it is shown subsequently that no such settlement of dowry had been made, the heir will not be held to collate that which she had never received. Art. 2329, C. C., does not apply when there was no reality in act of donation.

Donations *inter vivos* must be accepted in precise terms; in order that the heir be held as a donee and ordered to collate, it must be shown that she was a party to the alleged act between her parent and her husband and accepted the donation.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

B. B. Howard for Plaintiff, Appellee.

Carroll & Carroll for Mrs. T. W. Castleman, Defendant, Appellant.

Clegg & Quintero for Charles V. Carroll, Defendant, Appellee.

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Dart & Kernan for Mrs. Prochaska and others, Defendant, Appellee.

E. M. Hudson for Mrs. Airey and Mrs. Janin, Defendants, Appellees.

Argued and submitted March 24, 1896.

Opinion handed down May 4, 1895.

Rehearing refused June 1, 1896.

Mrs. Charlotte L. Bendy, wife of Daniel R. Carroll, died in April, 1892, leaving an estate in community with her husband. The latter was appointed administrator of her succession. He himself died in February, 1894. The heirs of the husband and wife are the same persons.

Mrs. Janin, one of the heirs, answered, setting up that there were collations due by different heirs, claiming as follows:

Of Mrs. Airey, three thousand three hundred dollars; of Mrs. Thomas, three thousand three hundred dollars; of Mrs. Janin, three thousand three hundred dollars; of Mrs. Prochaska, seven thousand nine hundred and eighty-two dollars and twenty-one cents; of Mrs. Nichols, nine thousand one hundred and twenty-four dollars and thirty-six cents; of Charles V. Carroll, three thousand three hundred dollars; of Leon J. Carroll, three thousand three hundred dollars; of Miss Emma McLearn, one thousand one hundred and forty dollars; of Miss Blanche McLearn, one thousand one hundred and forty-five dollars; of John G. McLearn, one thousand one hundred and thirty-five dollars and forty-four cents; of Thomas L. Carroll, three thousand three hundred dollars; of Mrs. Ann Castleman, two hundred and fifty dollars and twenty-five thousand dollars.

Mrs. Nichols, Mrs. Prochaska, Mrs. Thomas, Charles V. Carroll and the McLearn heirs all made the same answer substantially, claiming that the various heirs should be made to collate for the amounts for which they were respectively chargeable, and each specially charging that Mrs. Castleman was chargeable as claimed by Mrs. Janin.

Mrs. Castleman denied that she was indebted to the successions or liable to collate therein to an amount greater than two hundred and fifty dollars. She averred that Mrs. Virginia Carroll, widow of

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Thomas L. Airey, was indebted to the succession in the sum of twenty thousand dollars, the same having been advanced and donated to her by her father as set forth in the marriage contract between her and her husband, by notarial act of November 8, 1860; that she further owes two hundred and fifty dollars advanced to her by the deceased, and the further sum of three thousand and fifty dollars advanced to her by the executors; that she should be made to collate the sum of twenty-three thousand three hundred dollars in the partition.

She averred as to the best of her knowledge and belief that Charles V. Carroll was indebted in the sum of seventy-eight thousand eight hundred dollars for gifts, donations and advances made to him by D. R. Carroll and his executors, in different amounts and dates set out in the answer which he should be made to collate.

She also averred that the following named heirs were liable to collation: Thomas L. Carroll for fourteen thousand two hundred and eighty-four dollars and ninety cents; Mrs. Thomas for three thousand three hundred dollars; Mrs. Janin for three thousand three hundred dollars; Mrs. Prochaska seven thousand nine hundred and eighty-two dollars; Mrs. Nichols nine thousand one hundred and twenty-four dollars and thirty-six cents; Miss Emma McLearn one thousand one hundred and forty-five dollars; Miss Blanche McLearn one thousand one hundred and forty-five dollars; John G. McLearn, Jr., one thousand one hundred and thirty-five dollars and forty-four cents.

The claim advanced against Mrs. Castleman for twenty-five thousand dollars is charged as being "the value of a certain plantation known as the Coosa plantation, in the parish of Concordia," believed and averred to be a disguised donation made to her by her father, D. R. Carroll, during the lifetime of her mother under form of a sale to her husband, Thomas W. Castleman, and estimated to be worth that amount, twenty-five thousand dollars.

The District Court rendered a judgment "that the following named heirs herein collate by taking less for the several amounts received by them from their father or through the executors of the estates of their father and mother, to-wit: Leon J. Carroll, for the sum of three thousand three hundred dollars; Charles V. Carroll, for the sum of three thousand three hundred dollars; Mrs. Mary R. Prochaska, for the sum of seven thousand nine hundred and eighty-

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two dollars and twenty-one cents; John G. McLearn, for the sum of one thousand four hundred and thirty-five dollars and forty-four cents; Mrs. Clara Janin, for the sum of three thousand three hundred dollars; Mrs. Anna Castleman, for the sum of two hundred and fifty dollars; Miss Blanche McLearn, for the sum of one thousand one hundred and thirty-five dollars; Miss Emma McLearn, for the sum of one thousand one hundred and forty-five dollars; Mrs. Virginia Airey, for the sum of three thousand three hundred dollars; Thomas L. Carroll, for the sum of fourteen thousand two hundred and eighty-four dollars and ninety cents; Mrs. Stella Nichols, for the sum of nine thousand one hundred and twenty-four dollars and thirty-six cents; Mrs. Louise Thomas, for the sum of three thousand three hundred dollars."

It is further ordered, adjudged and decreed "that the demands of Mrs. Anna Castleman against Mrs. Virginia L. Airey, against Charles V. Carroll and against her co-heirs herein, as set out in her plea and answer, filed on the 13th of November, 1894, save and except as in this decree above recognized and fixed, are disallowed and rejected.

"That the demands of the several heirs as against Mrs. Anna Castleman for the value of property received by her during the lifetime of her father, D. R. Carroll, in addition to the amount of two hundred and fifty dollars hereinbefore fixed, be recognized as due; and that the said Mrs. Anna Castleman do collate by taking less in the sum of twelve thousand five hundred and forty-five dollars and sixty-three cents; together with the costs of this court, caused by this demand.

"That the notary public heretofore named for that purpose do proceed with the final partition of the proceeds of the sales hereinbefore made by order of this court, and of the other effects of the estates of D. R. Carroll and wife among the heirs thereof, in accordance with the law, and this decree recognizing the rights and interests of the several heirs subject to the collations herein decreed to be as follows: Mrs. Louise Thomas, wife of S. O. Thomas; Mrs. Anna Castleman, wife of T. W. Castleman; Mrs. Stella Nichols, wife of Nichols; Mrs. Clara Janin, widow of A. T. Janin; Mrs. Virginia Airey, widow of T. L. Airey; Mrs. Mary R. Prochaska, Leon J. Carroll, Thomas L. Carroll and Charles V. Carroll, each for one-tenth, and Misses Emma and Blanche McLearn and John G. Mc-

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Learn, grandchildren, each for one-third of one-tenth part of said estates."

Mrs. Anna Castleman appealed from this judgment. The appellees answered the appeal, praying that the judgment be affirmed, except as to an amendment asked to be made in their favor, increasing by one thousand dollars, with interest from the date of the opening of the succession of D. R. Carroll, the amount which Mrs. Castleman is held bound to collate.

The opinion of the court was delivered by

NICHOLLS, C. J. Mrs. Anna Castleman claims that her sister, Mrs. Thomas L. Airey, should be held to collate twenty thousand dollars.

On the 8d of November, 1860, a marriage contract was entered into between Miss Virginia Carroll, daughter of D. R. Carroll, and Thomas L. Airey. The father intervened in the act, declaring that he thereby settled upon the intended wife, as dowry, the sum of twenty thousand dollars. Thomas L. Airey in the act acknowledged to have received said amount from D. R. Carroll in ready money then and there paid, and consented to remain charged with the same.

On the 4th of October, 1892, Airey and wife and D. R. Carroll appeared before Samuel Flower, notary public, and two witnesses, and an act was passed in which, after reciting the marriage contract above mentioned and the acknowledgment therein of Thomas L. Airey that he had received the twenty thousand dollars settled as dowry, the parties severally declared "that by mutual consent and agreement by and between all the said parties the said sum of twenty thousand dollars had been returned and paid back by the said Thomas L. Airey to the said D. R. Carroll, who acknowledged the receipt thereof; that accordingly the donation made by the said D. R. Carroll to said Virginia Carroll of the said sum of twenty thousand dollars dowry is hereby forever revoked and dissolved, and the settlement of dowry made in the said marriage contract is hereby declared to be null and void, and the said donation and settlement of dowry are hereby settled."

In answer to interrogatories on facts and articles propounded to her, Mrs. Thomas L. Airey declared "the money in question, twenty thousand dollars, was returned long before (before the date of the act passed before Samuel Flower) to my father by Mr. Thomas L.

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Airey—in fact it was returned to my father by Mr. Airey on November 3, 1860, immediately after the signing of the marriage contract before Charles Springer, notary public. My father had handed over the twenty thousand dollars in currency notes, and after the signing of the marriage contract Mr. Airey returned the identical money to my father * * * This was done in my presence before leaving the place the signing took place.”

The opponent, Mrs. Castleman, invokes Art. 2329 of the Civil Code against the defence set up on behalf of Mrs. Airey. She also calls to our attention the fact that at the date of the act before Flower, the wife of D. R. Carroll was no longer living, and contends that D. R. Carroll was powerless to revoke the settlement of dowry so far as the succession of Mrs. D. R. Carroll was concerned. Art. 2329 of the Civil Code is as follows:

“Every matrimonial agreement can be altered by the husband and wife jointly before the celebration of marriage, but it can not be altered after the celebration.”

We do not think that the provisions of that article have any application to the matter now before the court. It is true that in the act before Flower the parties declare that the donation made by the father in the marriage contract was thereby “revoked;” but the question is one of the reality of the original donation rather than one as to its revocation, and whether or not twenty thousand dollars passed or was intended seriously to pass from Daniel R. Carroll to Thomas L. Airey for or on account of his wife. Laurent, in his work *Du Contrat de Mariage* (Laurent Code Civil, Vol. 21), after discussing at some length the irrevocability of marriage contract, says on p. 110, Sec. 86: “Le contrat de mariage contient parfois des énonciations fausses; il constate un apport qui n’a pas été fait, il donne quittance d’une dot qui n’a pas été payée. Faut-il appliquer, dans ces cas, le principe de l’immutabilité des conventions matrimoniales et maintenir les déclarations qui s’y trouvent jusqu’à ce que les parties intéressées les aient détruites par l’inscription en faux? A notre avis, l’article 1395 est hors de cause, et on a tort de l’invoquer; on ne déroge pas à une convention par la convention même. La véritable question porte sur une difficulté de preuve. L’acte fait-il foi jusqu’à l’inscription de faux de l’apport et du paiement de la dot? La négative est certaine; elle résulte des principes qui régissent la force probante des actes authentiques.

L'acte fait foi, jusqu'à inscription de faux, du fait matériel de la déclaration, il ne prouve que jusqu'à preuve contraire la vérité de la déclaration. On peut donc soutenir sans devoir s'inscrire en faux, que l'apport constaté au contrat de mariage n'a pas été fait, que le paiement de la det a été fictif.

In Dalloz & Vergé "Code Civil Annoté," we find the following authorities on that subject: Dalloz & Vergé, under Article 1395, C. N. No. 96: "De ce que le contrat de mariage est irrévocable, il ne suit nullement qu'on doive réputer sincères et vraies toutes les énonciations qu'il contient. Il peut être argué de simulation par les tiers, et la preuve contraire recevable soit par témoins, soit par un ensemble de présomptions graves, précises et concordantes (Jurisprudence Générale Contr. de Mariage 381).

No. 98. * * * "Est contestable par les autres enfants la mention portée dans le contrat de mariage de l'un d'eux, et qui désigne le beau-père de la future comme ayant reçu la dot constituée à celle-ci, quand réellement il n'a rien reçu et qu'il n'a été constitué aucune dot, et la preuve peut résulter, entre autres présomptions, d'une contre-lettre non revêtue des formalités exigées par les Articles 1395 et 1396 Code Civil."

Req. 5, Janv., 1831. Jurisprudence Générale. Contrat de Mariage, 382.

No. 99. "Une cour a pu, sans porter atteinte à l'immutabilité des conventions matrimoniales, dispenser du rapport à une succession une dot constituée par contrat de mariage si le paiement de cette a été simulé."

Req. 13 Juin, 1831. Jurisprudence Générale. Contrat de Mariage, 383.

No. 100. "Si les énonciations contenues au contrat de mariage sont contestables par simulation, la preuve de la simulation ne résulte pas nécessairement de la contre-lettre postérieure du mariage qui reconnaîtrait la fausseté des énonciations." Jurisprudence Générale. Contrat de Mariage, No. 384. Dalloz & Vergé under Art. 1122, C. N.

No. 27. * * "La déclaration du défunt qu'il n'a pas versé et qu'il était dans l'impossibilité de payer la somme par lui donnée à terme à l'un de ses enfants dans son contrat de mariage est opposable aux autres enfants, qui ne peuvent, dès lors, exiger le rapport de la somme donnée lorsqu'ils n'articulent contre cette déclaration aucuns

faits particuliers de fraude." Req. 20 Janvier, 1864, D. P. 65 1222. Dalloz & Vergé under Art. 1438, C. N., No. 56.

"En présence de la déclaration du défunt qu'il n'a pas payé la somme par lui donnée à terme à l'un de ses enfants par contrat de mariage, il n'y a pas lieu de demander le rapport de cette somme."

In the case at bar there is neither question of fraud involved nor of interference with the rights of forced heirs. The heirs other than the opponent recognizes that the money was really returned to D. R. Carroll, as stated by Mrs. Airey in her testimony, and the return of the money was evidently before the celebration of the marriage of Airey to Miss Carroll. We are of the opinion that the District Court correctly held Mrs. Airey not liable for the collation of this amount. Collation is based upon the theory that the person collating had withdrawn from the parent money or property which otherwise would have gone to swell the mass of the succession. It would be gross injustice to hold Mrs. Airey liable for an amount which neither she nor her husband had actually received. Mrs. Castleman moved to strike out a portion of the answers of Mrs. Airey to interrogatories on facts and articles, on the ground that they were not responsive to the questions asked; that she was seeking to prove by parol matters and things which could only be shown by written evidence over the signatures of D. R. Carroll and wife; that the statements were in conflict with the statements and acts of Mrs. Airey and her husband in certain acts of sale, and that Mrs. Airey was estopped thereby from claiming or asserting that the twenty thousand dollars dowry had ever been returned. We think the action of the court in overruling the objection was correct. Mrs. Castleman herself resorted to interrogatories on facts and articles, and she could not object to answers she had herself solicited. When Mrs. Airey did answer, she had the right, under Art. 353 C. P., in doing so, to state any fact tending to her defence, provided they were closely linked to the fact on which she was being questioned. We think her answers were so closely linked and they were admissible. Mrs. Castleman overlooked the fact that all the parties themselves to the original act, did, subsequently, by notarial act, recite the fact of the return of the money referred to as having been received as dowry, and that one of those parties was her father, through whom she was claiming as an ordinary heir. Mrs. Airey had a perfect right, in her answers, to fix the time of the return of

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the money. There was nothing done by Mrs. Airey in the acts referred to which estopped her from setting up the return of the twenty thousand dollars by her husband to her father.

Mrs. Castleman claimed in the District Court that Charles V. Carroll should be held to a collation of seventy-eight thousand eight hundred dollars. In this court "it is submitted that he should be condemned to pay twenty-two thousand four hundred and fifty-nine dollars."

In the brief filed in her behalf, it is said: "We have no evidence but the answers of Charles V. Carroll to interrogatories on facts and articles. Now what does he admit he has received? All of his answers must be read together to get a clear idea of the situation and of his manner of replying. They are not full, frank, or explicit, and the interrogations, to a large extent, should be taken for confessed."

We have compared the answers and questions, and while some portions of the latter have not been covered, we think that they have been substantially responded to in respect to all material points. Had more definite answers been desired, proceedings to that effect could have been taken. We discover no purpose to evade the questions. Our attention having been directed specially to a statement made at one time by Mr. Charles V. Carroll, that the agreements between himself and his father in regard to the profits of the Escobal factory had been made in January, 1887, and to a subsequent admission by him, to the effect that the written acknowledgment of his father touching that matter, which he produced in court, and which was dated January, 1887, had been, in reality, made out and signed in 1892, we do not attach the same importance to this difference of statement that counsel does. We think the paper made in 1892 was intended as an acknowledgment or recognition of an antecedent agreement made in 1887. We do not think that the answers to the questions have been successfully attacked. This conviction carries with it an affirmance of the judgment of the District Court as to this particular collation.

The claim of the different heirs that Mrs. Castleman should be charged with a collation of twenty-five thousand dollars as the value of the Coosa plantation, alleged to have been a disguised donation to her from her father in the form of an onerous contract of sale to her husband, T. W. Castleman has caused to be brought before us an

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immense record, a large part of which requires no special allusion to under the conclusions which we have reached.

On December 31, 1879, Daniel R. Carroll sold to his son-in-law T. W. Castleman, the Coosa plantation in the parish of Concordia, for eight thousand five hundred dollars; two thousand dollars being cash and the balance represented by two promissory notes of three thousand dollars each, secured by special mortgage on the property.

On the 19th of December, 1882, T. W. Castleman executed a special mortgage on this property in favor of D. R. Carroll, to secure the payment of two promissory notes, each for five thousand dollars.

On January 5, 1886, T. W. Castleman sold the plantation to Stanley O. Thomas (the husband of a sister of Castleman's wife) for eight thousand dollars cash.

On the 3rd of March, 1892, S. O. Thomas sold the property to W. H. Hudnall and Mrs. E. Castleman (the wife of a brother of T. W. Castleman) for nine thousand five hundred dollars; five thousand dollars cash and the balance of four thousand five hundred dollars represented by two promissory notes, secured by special mortgage. T. W. Castleman appeared as the agent of Thomas in making this sale.

On January 7, 1886, D. R. Carroll executed a receipt for the sum of eight thousand eight hundred and eighty-eight dollars as "being amount due him in full on two promissory notes for the sum of three thousand dollars, each dated December 31, 1879, due and payable one and two years after date, with eight per cent. interest from date until paid; said two notes are secured by mortgage on the Coosa plantation, and were given to secure balance of purchase price by act passed before N. B. Trist, notary public, on the 31st day of December, 1879. This receipt is given on account of my not being able to find said notes at this time to deliver to him.

On the 29th of February, 1888, D. R. Carroll and T. W. Castleman made affidavit before Trist, Notary, to the following effect:

"We, the undersigned, Thomas W. Castleman and Daniel R. Carroll, do on oath, declare that the two notes made by said Castleman to his own order and by him endorsed, dated April 5th, 1882, each for the sum of five thousand dollars, payable respectively at the Canal Bank, on the 15th of December, 1882, and 1st of January, 1883, and secured by mortgage on the hereinafter described property in

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favor of said Carroll, have been paid and satisfied, but that the same have been mislaid and can not on that account be produced, and the said Carroll, as the last holder and owner thereof, and as the party in whose hands the said notes were paid does hereby authorize and empower the recorder of the parish of Concordia and Tensas to erase and cancel from the records of their offices the mortgage which to secure the payment of said notes the said Castleman granted in favor of said Carroll by act before N. B. Trist, notary public, in New Orleans, dated December 19, 1882, on the following described property: (Here follows a description of the property mortgaged, being the Coosa plantation aforementioned, several lots in the town of St. Joseph and Tensas parish, and all the right, title and interest of T. W. Castleman in the succession of T. L. Castleman.)

On the 12th January, 1889, D. R. Carroll obtained a judgment in the District Court for the parish of Tensas, against Thomas W. Castleman for the sum of fifteen thousand dollars. On the 9th of January, 1894, D. R. Carroll transferred, for five hundred dollars, his interest in said judgment (D. R. Carroll's wife having in the meantime died) to Anna Castleman, wife of T. W. Castleman.

On October 9th, 1889, Mrs. Anna Castleman, on an allegation that her husband's affairs were in a disordered condition, resulting from the disasters which had lately befallen the country, and that since his marriage she had received in cash from her father the sum of one thousand dollars, the same being a manual gift which her said husband had used in his planting business, obtained a judgment of separation of property from her husband, and a dissolution of the community, and a monied judgment against him for nine hundred and thirty dollars. From the evidence it appears that Stanley O. Thomas acted as the commission merchant of Thomas W. Castleman for the Coosa plantation, from the time of his purchase of the same up to the sale of the plantation on March 3, 1892, by Thomas himself to Hudnall and Mrs. E. Castleman—the property though standing in the name of S. O. Thomas being really that of Castleman, as will be afterwards mentioned. That Thomas W. Castleman, in addition to owning the Coosa plantation, was the lessee of a plantation in the parish of Madison, known as the "Mound plantation," and that D. R. Carroll was the commission merchant of Castleman in respect to the Mound plantation business; that the ten thousand dollars mortgage which has been referred to was given to secure D. R. Carroll

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against Castleman's indebtedness to him as arising from that business, and that the fifteen thousand dollars judgment against Castleman was a judgment based on indebtedness to Carroll by Castleman on account of the same business.

It appears that Castleman in the course of his business became indebted to his factor S. O. Thomas, and that the transfer to the latter, though apparently a sale was in reality a security to Thomas for his claim. The property was ostensibly bought by Thomas for eight thousand dollars cash. He says he gave his check for that amount payable to the order of Castleman; that Castleman passed this check by endorsement over to D. R. Carroll; that Carroll gave him (Thomas) his own check for the same amount. Prior to that time, Castleman had obtained from D. R. Carroll possession of the two mortgage notes which represented the credit portion of the purchase of the Coosa plantation from Carroll to himself, and had handed them to Thomas as collateral, to secure his indebtedness to him. Thomas held the notes at the time of the transfer to him of the plantation, but they were at that time misplaced. They were finally delivered to Castleman. Thomas wrote out a counter-letter when the property was placed in his name, in which he recognized that he held it only by way of security. When Thomas sold the property in 1892 to W. H. Hudnall and Mrs. E. Castleman, he received out of the price four thousand dollars cash, which he credited to Castleman's indebtedness, and he turned over the two mortgage notes to Castleman himself, one thousand dollars of the price went to Castleman's brother on account of some relations between the two. Thomas subsequently purchased these two notes from Castleman for himself and some third person not named. According to his testimony he did so, because Castleman told him he wanted to buy a piece of property, "the home (said the witness) in which he now lives."

Thomas says that when the property was transferred to him, he held the original two notes representing the purchase price of Coosa and showed them to D. R. Carroll, who told him that Castleman had paid no portion of the purchase price of that plantation. A large part of the record brought up consists of letters which passed between Castleman and D. R. Carroll, both before and after the sale of the Coosa plantation to Castleman, which conclusively establish, in the opinion of the heirs advancing the claim against Mrs. Castleman when taken in connection with the other testimony in the case, the

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fact that the act of sale of the Coosa plantation to Castleman was a disguised donation from D. R. Carroll to Mrs. Castleman, through her husband. There was unquestionably a desire on the part of the father, prior to the sale to the husband, to make a donation of the property to the daughter, and an undoubted willingness on the part of the son-in-law to receive it, though not in the form which Carroll had proposed this should be done. Castleman, himself, suggested to Carroll that a sale should be made to himself, and the notes should be sent or given to the wife; that he would then acknowledge himself indebted to his wife for the amount of the notes, or a larger amount if it were though advisable; Castleman's object evidently being to own the property and to hold it protected against claims against himself, which might thereafter arise by recording a mortgage claim against himself in favor of his wife. Castleman testifies that the matter was abandoned in consequence of advice received from his friend, Judge Spencer, and that thereupon an actual sale of the property was made to him, though, as he says, for an amount considerably less than the value of the property, Carroll saying he had done as much for his other sons-in-law. He says he promised Carroll that he would not sell the place without his consent; also, that he would give his wife the benefit of any excess in value in the place should he sell it. There are in a number of letters written by Castleman to Carroll after the sale, expressions which give rise to a strong belief that there was some kind of an understanding between these two parties that the sale to Castleman should be made to enure ultimately to the benefit of the wife. Castleman speaks of the property frequently as a gift, and refers to his wife in that connection, and Carroll obviously was of the opinion that he was benefiting his daughter. Castleman says that these references by him to the sale as a gift, was by reason of the fact that Carroll had sold him the plantation below the actual value on which he placed an exaggerated estimate, and that his relations were such with his wife's father that he had to humor him and deal with him in a way which he admits was not up to an exact standard of right. He says he was a very obstinate and peculiar man, and he had to act accordingly. Counsel of opposing heirs charge Castleman with duplicity and double dealing in this matter; they say he for years lulled D. R. Carroll into the belief that he was in good faith holding the property for his wife, protected by a recorded claim, while in point of fact he was attempt-

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ing to hold it exclusively for his own benefit, but at the same time they take the position that the act of sale was a disguised donation from the father to the daughter. Castleman testifies that the receipts given by Carroll were true; that he actually paid the four notes referred to therein, and he is corroborated to some extent by his brother as to certain payments made by him upon the purchase price of Coosa. He says that he was under the impression that notwithstanding the payment of the price itself, the notes would still be outstanding and susceptible of being legally used as collateral for his debts; that Thomas, as well as himself, was of that opinion, and that when D. R. Carroll offered to make endorsements upon the notes of partial payments as made, he, Castleman, objected, stating to him that by such endorsements the notes could no longer be used for that purpose; that he obtained those notes from Carroll for that express purpose, leaving the payments of the price to be evidenced by receipts. It might be conceded that if Castleman, instead of being a son-in-law of D. R. Carroll had been his son and presumptive heir, and a claim were being made against him as an heir for collation, a strong case would have been presented in support of that claim, but the claim for collation is directed not against Castleman, but against his wife, for and on account of transactions between him and her father. From that standpoint matters assume a very different shape.

There is no evidence going to show that Mrs. Castleman was either directly or indirectly a party to the sale or act in question, or that she consented to accept the property at all, still less with obligation to collate in any way for the same. On the contrary, there is evidence that she positively declined to do so. Certainly neither her father nor her husband, nor both together could force her by any agreement between themselves to assume obligations to which she gave no consent. During the period that the property stood in the name of her husband upon the public records, it was subject to become, as in fact it did become liable for the payment of her husband's debts, with no power of protection on her part against such a result. Her own father, after the sale in question, took a special mortgage on the property to secure a debt of ten thousand dollars due him by the husband, and Thomas, to whom it was afterwards transferred, received out of the price of the sale made by him to Hudnall and Mrs. E. Castle-

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man four thousand dollars wherewith to pay a debt unquestionably not that of the wife, but of Thomns W. Castleman. Prior to this, Thomas had received additionally six thousand dollars, arising from moneys paid on insurance policies covering buildings and cotton on the property which had been destroyed by fire, which amount was also applied by him to the payment of debts due him by the husband. Assuming as a fact, that the husband did deceive the father, and that there was a secret understanding between D. R. Carroll and Castleman, that the sale was a simulation, and that the real character of the act was an intended donation to the daughter, the penalty for this deceit could not be visited upon the daughter, who was not a privy to it.

We are not prepared to say that the sale was a simulation or a disguised donation to his daughter, though D. R. Carroll may have intended that it should enure indirectly to some extent to her benefit. We are inclined to think that the sale to Castleman was a real sale, but one made at a low price to him. There was no necessity for disguise in this transaction. D. R. Carroll was a man of large wealth; there existed no reason why he should not have made a donation to his daughter of the full value of the place entirely freed from collation, if he thought proper so to do. There is no claim or pretence that the rights of forced heirs have been interfered with. The question is one of simply ordinary collation. Carroll had a legal right to give the property to the daughter; she had the legal right to receive it.

There is, therefore, no ground for applying in this case any question of donations in favor of a person incapable of receiving through dispositions, whether disguised under the form of an onerous contract, or in the name of persons interposed. The case calls for no presumption that the son-in-law is an interposed person. Were he such a person, the act, under Art. 1491, C. C., would be a nullity, not one giving rise to collation against the wife, no party to it. Neither is there any ground for the application of the provisions of Art. 1248, C. C., which declares that "the advantage which a father bestows upon his son, though in any other manner than by donation or legacy, is likewise subject to collation. Thus, when a father has sold a thing to his son at a very low price, or has paid for him the price of some purchase, or has spent money to improve his son's estate, all that is subject to collation."

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That article, in the absence of any question of interposition, does not extend to a sale made between a man and his son-in-law.

Though we have no article in the Louisiana Code corresponding to Art. 849, C. N., which is to the effect that:

"Les dons et legs faits au conjoint d'un époux successible, sont réputés faits avec dispense du rapport.

"Si les dons et legs sont faits conjointement à deux époux, dont l'un seulement est successible, celui-ci en rapporte la moitié, si les dons sont faits à l'époux successible, il les rapporte en entier," we know of no text of the law making a wife liable to collation indirectly for gifts or donations to her husband. Succession of Landry, 25 An. 183; Ardis vs. Theus, 47 An. 1437. We do not here refer to cases in which the rules of interposition would be properly applied. There being no reason for applying those rules here, the particular form in which Carroll manifested his intention or desire to benefit his daughter, if such he had, would tend rather to show that he desired to so shape matters as to exempt her legally from collation, than that he was seeking through improper methods to bring about a similar result. It is a significant fact that nowhere in the books or papers of the father is to be found any charge against the daughter.

In France the decisions generally ascribe resort to an act in the form of an onerous contract, as evidencing an intention to exempt from collation the party benefited by the act. Thus we find in Dalloz & Vergé under Art. 848, C. N., the following:

No. 85. "Sulvant une opinion le seul fait de déguiser la donation emporte dispense de rapport." Grenoble, 6 Juillet, 1821; J. G. Success, 1120; Lyon, 22 Juin, 1825; *Ibid* et Dispos entre vifs, 4619; Agen, 4 Mai, 1830; *Ibid* et Dispos entre vifs, 614; Caen, 26 Mars, 1833; J. G. Success, 1120; Reg, 9 Mars, 1837; *Ibid*, et Dispos entre vifs 1633; V. autor en ce sens J. G. Succ. 1120.

No. 87. "Il en est spécialement ainsi de la libéralité déguisée sous la forme, soit d'une vente d'immeubles." Rennes, 10 Février, 1818; J. G. Succ. 1120; 1 Toulouse, 7 Juillet, 1829; *Ibid*, Bordeaux, 20 Juillet, 1289. *Ibid*.

No. 97. "Lorsque la donation est déguisée la dispense de rapport n'a pas besoin d'être exprimée dans les formes de l'Art. 919; elle peut résulter de toute manifestation quelconque." Req. 9 Mars, 1837; J. G. Success, 1122, et Dispos entre vifs, 1633.

Opponents claim, however, that Mrs. Castleman ultimately derived benefit from the sale of the Coosa plantation; they say she ultimately received from the price of the last sale thereof the money with which certain property which they say stands in her name in New Orleans, was purchased. That by accepting that money she made herself privy to the antecedent acts between her father and her husband looking to conferring upon her a benefit through the sale of the Coosa plantation. There is no necessity of examining into what the legal situation would be were such the case. We find no evidence in the record to establish the fact itself.

We think the judgment of the District Court condemning Mrs. T. W. Castleman to collate twelve thousand five hundred and fifty-five dollars and sixty-three cents for the Coosa plantation is erroneous. We think the various heirs should pay legal interest upon all sums received by them prior to the death of D. R. Carroll, and for which they are held to collate from the date of his death, and that the different heirs should also pay legal interest on all amounts received by them since the death of D. R. Carroll from the dates upon which the amounts were respectively received. We see no reason for passing at present upon the rights and interests of parties in the judgment obtained by D. R. Carroll against Thomas W. Castleman; that matter is left open for future adjudication and action. We see no ground for holding Mrs. Castleman liable to collation for one thousand dollars as prayed for in the motion of appellees to amend the judgment. That claim seems to have originated in this court; we find no allusion to it in the pleadings in the District Court, and no argument touching it was made in this court. We do not know upon what it was based, possibly it was upon the amount which formed the basis of the judgment of separation of property between Castleman and his wife, but we do not feel at liberty to deal with that question as matters stand.

For the reasons herein assigned, it is ordered, adjudged and decreed that the judgment of the District Court, in so far as it "adjudges and decrees that the demands of the several heirs as against Mrs. Anna Castleman for the value of property received by her during the lifetime of her father D. R. Carroll, in addition to the amount of two hundred and fifty dollars hereinbefore fixed, be recognized as due," and as it "ordered and decreed that the said Mrs. Anna Castleman do collate by taking less in the further sum of twelve thous-

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and five hundred and fifty-five dollars and sixty-three cents, together with the costs of this court caused by this demand" be and the same is hereby annulled, avoided and reversed.

It is further ordered, adjudged and decreed that the different heirs in the successions of D. R. Carroll and wife be and they are hereby decreed to owe legal interest upon the various amounts which they received prior to the death of D. R. Carroll, and for which they have been held to collate from the date of the death of the said D. R. Carroll, and legal interest upon the amounts which they have received since the death of D. R. Carroll, from the dates of the respective receipts of said amounts.

It is further ordered, adjudged and decreed that the right of the heirs to claim from Mrs. Anna Castleman, by way of collation, the amount of one thousand dollars, which they set up in their motion to amend the judgment appealed from, be and the same is received and left open for future examination, as are also the rights of all parties in and to and in respect to the judgment obtained by D. R. Carroll against Thomas W. Castleman.

It is further ordered, adjudged and decreed that the judgment appealed from, except in so far as the same is herein annulled, avoided and reversed and herein amended, be and the same is hereby affirmed. Appellees to pay costs of appeal. Costs in court below to abide the final decision in the cause.

No. 11,943.

SUCCESSION OF MRS. HENRIETTA KAISER.

ON MOTION TO DISMISS.

When the subjects of a judgment are distinct acquiescence in one will not defeat the appeal as to the judgment on other and distinct demand.

ON THE MERITS.

Where executors have the administration of a succession composed entirely of stocks which have a market value, but fluctuate, and they sell the same at private sale in small lots for the interest of the succession, when a public sale would have had the effect of depreciating the value of the stock, by putting on the market large amounts at one time, they will not be held responsible for the loss in value estimated at the highest market quotations, when no demand has been made upon them by particular legatees, or the universal legatees, to pay the legacies, and for this purpose demand a public sale of the stocks by an order of court.

48 973;
49 971

Succession of Kaiser.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

Percy S. Benedict and Robert G. Dugué for Executors and Appellees,

Benjamin Rice Forman for Residuary Legatees, Appellants.

ON MOTION TO DISMISS.

Submitted on briefs December 16, 1895

Opinion handed down January 6, 1896.

ON THE MERITS.

Argued and submitted April 8, 1896.

Opinion handed down April 20, 1896.

Rehearing refused June 1, 1896.

ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

MILLER, J. Under the will of the deceased, there was, after some special legacies, the usufruct of a sum of money to Mrs. Siegel, at her death to accrue to her children, who were constituted her universal legatees. The executors filed an account which was opposed by Mrs. Siegel individually, and as tutrix of one of the children, and by the children of age as universal legatees. The opposition claimed the executors were liable for a large amount for loss alleged to have arisen from their administration, and opposed a number of items of the liabilities placed on the account. The judgment sought by the opposition was that the executors be decreed liable for the alleged loss, that the items opposed be stricken from the tableau, and that they be ordered to pay the money the usufruct of Mrs. Siegel. From the judgment amending the account in some respects in favor of Mrs. Siegel for the money constituting her usufruct and awarding the residue to the universal legatees, the executors appealed. Soon after their appeal they paid the money to Mrs. Siegel, taking her receipt, concurred in by her children, who waived any security from her usufructuary. Subsequently the universal legatees apprehen-

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sive the executors would abandon their appeal, obtained an order as appellees to bring up the record with a view of answering the appeal and they have filed the record. They also obtained an appeal, and hence are here as appellees and appellants. They are met in this court with a motion to dismiss, based on the payment of the money given in usufruct by the will to Mrs. Siegel, and awarded by the judgment of the lower court. The receiving of this money, it is claimed by the executors, is acquiescence by the universal legatees in the judgment of the lower court on their opposition, and, therefore, a bar to their appeal.

Acquiescence in a judgment precludes any appeal, and it will make no difference that it is acquiescence in part only of the judgment. C. P. Art. 567. But this rule applies to the judgment on the demand, the subject of the settlement or other form of acquiescence. If the demands passed on by the judgment are distinct, it is not easy to see that a settlement tendered and accepted as to the one, can be deemed acquiescence in the judgment rejecting other demands, not at all connected with that settled or abandoned. Whenever the subjects of the judgment are distinct, it seems to us the adjustment and withdrawal of one of the demands will not prejudice the appeal as to the other subjects of controversy. In this case the executors, after their appeal, paid from the succession funds the usufruct legacy to Mrs. Siegel. The universal legatees joined in the receipt, for the reason, as we infer, to waive any right that the executors might have to require security from the usufructuary. This settlement undoubtedly put an end to the appeal of the executors so far as the judgment directed that payment. It was the voluntary execution of the judgment by them. It was the acceptance of the money Mrs. Siegel claimed in the opposition. But the demands of the universal legatees against the executors that they should be charged with the losses on the succession property, and that certain items should be stricken from the account, were not at all connected with the demand of the usufructuary. On the appeal of the universal legatees, they had the right to be heard on their demands. They had fortified that right by their own appeal. Code of Practice, Arts. 588, 589, 590. There was in our view no acquiescence to bar the right of the legatees, growing out of these appeals. Their assent to the payment of the money due to their mother, not contested, and whether contested or not, is immaterial,

Succession of Kaiser.

was not acquiescence in the judgments on the other and different demands of the universal legatees. *Liles vs. The New Orleans Canal and Banking Company*, 6 Rob. 278; *Clements vs. Cassily*, 3 An. 358; *Mitchell vs. Lay*, 3 An. 598; *Dwight vs. Brashear*, 12 An. 860; *Flowers vs. Hughes*, 46 An. 439.

The motion to dismiss is therefore denied.

ON THE MERITS.

MCENERY, J. The deceased died in Germany. She left a will in which she made a number of particular legacies, and disposed of the *residuum* of her estate.

The particular legatees and the universal legatee pursue the executors to make them responsible for not disposing of the personal effects in time, claiming that a failure to do so has resulted in loss to them. The particular legatees have no cause of complaint as there is enough in the succession to pay them in full. There was a usufruct of six thousand dollars, and a particular legatee for the amount. This has been paid, and the payment is evidenced by a receipt for the amount.

The estate consisted entirely of stock in corporations. The contention of the universal legatee is that this stock should have been sold under an order of court in ten days, the same as is done in the case of the administration of vacant successions. We express no opinion on this, because it is unnecessary. But conceding the law to be the same for a succession administered by executors, as that of a vacant succession, the executors could only be charged with the difference in value between what it would have brought had an order for the sale been provoked and its value at the time it was disposed of. The testimony shows that at the opening of this succession there was financial depression; that to put the large amount of stock that the succession owned on the market would have caused its decline and it would not have realized the value of the stock. It could be better disposed of at a private sale in small blocks. Some shares of the same kind of stock were sold above the inventoried value, but these sales were exceptional. On the whole, the evidence discloses that the executors were careful and prudent, and acted upon the most conservative line of conduct in order to realize as much as possible from the stock. Letters were issued to the executors on the 29th day of June, 1893. In November following the

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judge of the Civil District Court, parish of Orleans, issued an order that they should dispose of the stock at private sale. He was evidently impressed with the same idea which controlled the executors in the discharge of their duty.

The stock was of high class, paying good dividends. There was, apparently, no use for its immediate sale. There was no formal demand made upon the executors by the particular legatees for the payment of their legacies. With propriety had such demand been made the executors could have satisfied the particular legacies at the market value of the same, had the legatees been disposed to accept the same.

The Citizens Bank stock was appraised at eighty-five dollars, but the executors realized one hundred dollars for the same. The St. Charles Street Railway stock was appraised at seventy-five dollars per share, and sold from seventy-six dollars and twenty-five cents to fifty-four dollars and fifty cents. The New Orleans City & Lake Railroad stock, appraised at one hundred and thirty dollars per share, sold for one hundred and twenty-four to one hundred and eleven dollars.

The stock fluctuated in value, and it was problematical whether if sold in ten days after the succession was opened it would have realized a greater price. At any rate there was no formal demand made upon the executor to pay the legacies, either by the particular legatee or the universal legatee. They finally provoked a sale of the stock remaining in the succession, and it brought less than the market quotation; that is, it steadily declined as it was offered. The executors were only able to sell in small quantities. The testimony of the brokers as to the inexpediency of offering the stock in large quantities at public sale was confirmed by these public sales. The bidders were limited in number. There can be no doubt that the executors acted for the best interest of all concerned. They are business men of high standing and evidently knew the market and the best means of disposing of the stock. We are satisfied that the succession has lost nothing by their administration.

Objection is also made to the payment of the fees of the notary, appraisers, attorneys and the commissions of the executors. The attorney for absent heirs, the appraisers and the notary were paid on the order of the judge, and the executors are protected by this decree. The lower judge fixed the fees of the attorneys for the exec-

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utors on the amount of the estate in Louisiana, and we think his estimate of the value of the legal services rendered is correct, and we will say the same in reference to the fee of the attorneys who provoked the exhibition of the will.

The executors' commissions were properly calculated upon the estate administered here by them.

Judgment affirmed.

No. 12,097.

CORNELIUS MCCARTHY VS. THE WHITNEY IRON WORKS COMPANY.

While it is the duty of the master to keep his premises in a safe condition so as not to endanger the life or limbs of the servant, yet the servant will be denied relief against the master for injuries arising out of the unsafe condition of his premises, if with ordinary prudence the servant could have avoided the injuries. 2 Thompson on Negligence, pp. 946 *et seq.*, 1003, sec. 15 *et seq.*

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Benjamin Rice Forman for Plaintiff, Appellant.

Saunders & Miller for Defendant, Appellee.

Argued and submitted April 21, 1896.

Opinion handed down June 1, 1896.

The opinion of the court was delivered by

MILLER, J. The plaintiff sues for damages for personal injuries sustained in the course of his employment as a laborer in defendants' service, and due, he alleges, to their negligence. The answer denies any neglect on the part of the defendants, and charges that plaintiff's injuries were due to his own imprudence. The appeal is by plaintiff.

The work in which plaintiff engaged was digging a pit on defendants' premises used for molding castings. The excavation was about ten feet, and when the bottom of the pit was reached, the plaintiff was struck by a heavy piece of iron left in the pit by the "overflow"

48	978
106	178
48	978
119	577

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as the witnesses term it, of some previous casting, and which fell because the earth around it was removed by plaintiff and his fellow workmen in the progress of the excavation. Of course, this piece of iron formed by the hardening of the melted metal remaining from a former casting, was not attached to the walls of the pit, or secured in its position in any way, but kept in place only by the earth around it, was bound to fall when the earth was removed. The shape of the iron disclosed, as the excavation proceeded, was irregular, wide at bottom, coming to a point at the top, with rough, uneven sides, and of a character to suggest it served no purpose in the pit. It is in proof that when the digging had reached a point to reveal a part of this iron, its appearance attracted the attention of the workmen, caused some comment, and one of the witnesses testifies he tried to shake it; another, that it obstructed the work, and there were expressions of the workmen in reference to this impediment, and another witness states he told plaintiff not to undermine it, but he testifies, he heard no such warning nor does it appear it was heard by the other workmen. When the iron fell, plaintiff about finishing his work, begun in the morning, it then being evening, was levelling the bottom of the pit with his back to the iron. The heavy weight falling on him, inflicted injuries to his hip, legs and ankles of a character so serious as to make him a cripple with diminished usefulness for life. On the issue of the knowledge of the defendants of the presence of this piece of iron in the pit in which their laborers were employed, there is the testimony that the previous proprietor of the premises using the pit for the same purpose as that for which defendants used it, left this iron in it; there is testimony that since their purchase defendants had molded large castings frequently in the pit, and there is the statement from one of the witnesses that their foreman knew of the iron and had said, before the accident, it should have been removed.

The duty of the employer to take all reasonable care against accidents to his workmen or servants, in the course of their employment, includes the obligation to keep the premises in which their services are to be rendered in safe condition. Especially is this obligation enforced in respect to latent dangers of which the employer is aware, or which with reasonable diligence he could have informed himself. The servant takes no risk of such dangers unless the circumstances are such that he should have become aware of them in the perform-

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ance of his duties. When thus apprised, or when the danger should have suggested itself, the protection of the servant against such risk, latent at the outset is withdrawn, or at least, qualified, 2 Thompson on Negligence, pp. 946, 947 *et seq.* 972, 959, 965, 1009. If this case was simply that of a workman injured while working in a pit in which there was a mass of iron apt to fall at any moment, and which did fall on him, he having no warning of the danger, it would be difficult to relieve the employer from responsibility. His ignorance of the danger to which the servant was exposed, advanced as a defense, might be answered by his obligation to know that of which with reasonable diligence he would have known. But while this responsibility of the master is recognized, there is a limitation. The servant is presumed to take the risk of danger plainly revealed to him. From 11 o'clock in the morning till evening, the plaintiff and his fellow workmen were engaged in this work. They perceived this mass of iron with every indication that it was a foreign body placed or left in the pit. In the testimony of plaintiff, or at least, of his fellow workmen, they recognize the iron was an overflow, as they term it from a previous casting. It is difficult to resist the conclusion that the character of the iron, and that it was kept in place only by the earth they were removing, must, or at least, should have occurred to the workmen while the work was proceeding. It may be claimed the plaintiff supposed there were fastenings to keep the iron in place. But fastenings for such a body would hardly occur to any man of ordinary observation and reason. The law in this class of cases holding the master responsible, supposes the injury, the subject of complaint, is due to his negligence. But if the party seeking relief has encountered a plain danger, he could have completely avoided by the ordinary prudence exacted of all, the alleged neglect of the master ceases to be a factor, and the overshadowing imprudence of the servant is deemed the cause of the injury he sustained from the peril he incurred, and should have shunned (2d Thompson Negligence, p. 1008, sec. 15 *et seq.*). In this case the iron was revealed in part, at least, as soon as four feet of the earth was removed, and in its entirety before the bottom of the pit was reached, but no call was made on the defendant or its foreman to have the iron removed. The foreman in charge states he knew nothing of the iron. Whether or not he did, the workmen knew of it. If that call had been made

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and disregarded, there would be some reason to attribute their persistence in the dangerous work to the natural reliance of the servant on the protection of the master, and on his superior judgment. But no communication was made to him. Thus, in the presence of an obvious danger there was no call to remove the iron, which, if made, would doubtless have spared the plaintiff the misfortune that came on him. It is suggestive, too, that plaintiff alone of the five workmen employed was in reach of harm. We are disposed to think the attention and comment of which the iron was the subject while the work was in progress had its influence in producing on his fellow-workmen an appreciation of the danger of which the plaintiff was unconscious, and as already stated, his back was turned to the iron when it fell on him. The review of the whole testimony points to that imprudence on plaintiff's part which is fatal to his suit.

We have considered the authorities from the text books and the decisions cited by plaintiff. *Hanson vs. Railway & Transportation Company*, 38 An. 111; *Faren vs. Sellers*, 39 An. 1011; *Clairain, Tutrix, vs. Telegraph Company*, 40 An. 178; *Myhen and Wife vs. Electric Light & Power Company*, 41 An. 967. The expression in one of these cases that contributory negligence on the plaintiff's part, not imprudent nor negligent in a legal sense, will not bar his recovery of damages, might have had application to some phase of that case, but on the rehearing the court felt impelled to sensibly qualify the expression. The other decisions affirm that the master must provide the servant with safe appliances to do his work, and relieves him from the risk of latent defects in the the machinery he is expected to use. That duty of the master extending as it is to keeping his premises in a condition not to endanger the life or limbs of the servant, we have borne in mind in dealing with the case. But it seems to us that the decision here is controlled by that limitation of the master's responsibility, excluding it when the injury to the plaintiff seeking relief, is due to his own carelessness. The record, in our view, puts the plaintiff in the position of undermining or removing all support from the iron, with the certainty that ought to have suggested itself that every spadeful of earth he was removing brought him nearer to the fall of the iron, and that risk to which he exposed himself from the fall. It is the case of one provoking by heedlessness, the injury of which he complains, and which ordinary prudence on his part could have been averted. We are re-

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luctant to reverse the verdict of the jury, but are confirmed in our conclusion by the fixed conviction of the lower court, which led it to set aside the verdicts of two juries.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be affirmed with costs.

No. 12,092.

MRS. CAROLINE HODDING ET ALS. VS. THE CITY OF NEW ORLEANS.

The supplemental assessment roll, provided by law to supply omissions or correct errors in the original roll, must be accompanied with notice to the property owner proposed to be bound by the supplemental assessment, but payment of the State taxes based on such assessment will preclude the owner from urging the want of such notice when called on to pay the city taxes levied on the same assessment. Acts 1888, No. 85, Sec. 11; Acts 1890, No. 106, Sec. 11. The court again affirms that notice to the owner of the tax sale for taxes assessed since 1879, is indispensable to pass title, and a paper purporting to give such notice, left with one not the agent of the owners, is no notice. Constitution article 210; Act No. 85 of 1888, Sec. 40, *et seq.*; 44 An. 912; 45 An. 1109; 46 An. 403.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Benjamin Rice Foreman for Plaintiffs, Appellants.

Henry Renshaw, Assistant City Attorney, and *Samuel L. Gilmore*, City Attorney, for Defendant, Appellee.

Argued and submitted May 8, 1896.

Opinion handed down June 1, 1896.

The opinion of the court was delivered by

MILLER, J. The plaintiffs sue to annul a tax sale of their property made to satisfy the city taxes of 1889, as well as the assessment under which the sale was made. The grounds of the suit are, that the assessment was made without notice to the plaintiffs and without notice to them the sale was made. The defence is, that plaintiffs are estopped from disputing the assessments by paying the State taxes, based on the same assessments, and the answer maintains

48 982;
50 964;
50 966
50 967

48 982
52 1856
52 2029

48 982
104 311
104 314
48 982
106 224

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that the tax sale was made in accordance with law. From the judgment against plaintiffs. they appeal.

It appears that the property was assessed on the regular roll of 1889 as the property of Anna L. Carter *et als.* The owners were the widow and children of the late Needler K. Jennings, Anna Maria Jennings, Alice, Caroline, Cora and Anna Jennings. Discarding this assessment, the city made a supplemental assessment in 1893, exhibiting the names of the owners. Notices of the proposed sale of the property for these taxes of 1889, addressed to Anna M. Jennings, *et als.*, were served upon Mr. B. R. Forman, who stated to the serving officer, he, Forman, had no authority to act for the plaintiffs, and the sale to the city followed in March, 1894. In the deed of sale to the city there is the statement that notices were served on the delinquent taxpayer, hereafter mentioned, and the names thus indicated as receiving notice, we find to be Anna M. Jennings, *et als.* At a later period the plaintiffs paid the State taxes on the property according to the supplemental roll, and instituted this suit to annul the assessment and recover the property from the city.

Our law provides for the assessment of property omitted, or assessed in the wrong name on the roll of the year, with the limitation that such assessments to supply omissions or correct errors in the rolls shall not extend beyond the previous three years. This provision is common in the revenue statutes of all the States, and has stood for years as part of our law. R. S., Sec. 3262; Act 88, No. 85, Sec. 11. Of course, the power to assess property omitted carries the necessity of notice to the owner indispensable in all assessments. This is implied by the language of Sec. 11 of the Act of 1888, under which the supplemental assessment in controversy was made, and we perceive that in the revenue act of 1890, No. 106 Sec. 11, there is careful provision for the mode of notice. The pleadings in this case put at issue this, question of notice, and there is no proof on the subject. We find, however, that the plaintiffs paid the State taxes, based on the assessment. We maintain the assessments on this recognition. Notice is to convey knowledge to the taxpayer that his property is assessed, and if he manifests that knowledge by payment of the State taxes, the purpose of the law in respect to requiring notice must be deemed accomplished.

It seems unnecessary to repeat that the title of the owner can not be divested by a tax sale for taxes accrued since 1879, without notice

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to the owner of the sale. The requirement is expressed in the plainest language in the organic law, has been repeated in every revenue statute since the Constitution, and time and time again has been enforced by this court. Constitution, Art. 210; Act No. 77 of 1880, Secs. 25 to 28; Act No. 96 of 1892, Sec. 49 *et seq.*; the later acts and Act No. 85 of 1888, Sec. 40 *et seq.*; *Norres et al. vs. Hays et al.*, 44 An. 912; *Montgomery et als. vs. Land and Lumber Co. et al.*, 46 An. 408. *Lambert vs. Craig*, 45 An. 1109, and similar cases. In this case, instead of following the direction of the statute as to the notice of the tax sale, we have the substitution of a paper addressed to one only of the owners left with a member of the bar, not the agent in any sense, to admit of such service upon him. For want of the required notice the sale must be set aside.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed; that the assessments on the supplemental roll of 1889 be maintained as valid assessments against plaintiffs, but that the sale of the plaintiffs' property under said assessments be avoided and annulled, and that defendant pay costs.

No. 11,941.

MICHAEL WALSH ET AL. VS. MRS. JOSEPHINE HARANG AND HUSBAND.

The publication required by law in tax sales for collection of delinquent taxes prior to 1880, must conform to legal requirements. Advertisements standing in lieu of notices must present on their face the data necessary to place parties in interest on their guard. The law contemplates publication under a legal assessment.

In an action of warranty, interest on the price can well be held to be balanced by the rent.

A warrantor by a call in warranty and service of defendant's pleadings therein, is advised of the attack made upon the title he had conveyed, and it is his duty to inform himself by inspection of the record of the character of the attack.

When a defendant in a petitory action is evicted from land upon which he has paid taxes he should recover from the plaintiff the taxes paid. 12 An. 331.

A purchaser, being a possessor in good faith, against whom a judgment of eviction has been obtained, is entitled to recover a judgment for such amount of improvements made by him as ensured to the benefit of plaintiff. 10 Rob. 178.

The warrantor is not liable for the fees of an attorney employed by the party evicted. 14 An. 826.

APPPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

48	984
49	1475
49	1513
49	1789

48	984
50	967
51	1632

48	984
104	715

48	984
111	1086

48	984
1120	400

Walsh et al. vs. Harang and Husband.

F. L. Richardson, Kernan & Wall for Plaintiffs, Appellees.

Alfred E. Billings for Defendant, Appellant.

J. Zach. Spearing for Defendant in Warranty, Appellant.

Argued and submitted March 14, 1896.

Opinion handed down April 6, 1896.

Rehearing refused June 1, 1896.

Plaintiffs were the heirs of Michael Walsh, who died in New Orleans on the 7th of December, 1866, bring suit to recover certain property acquired by Negrotto from the State Tax Collector of the upper district of New Orleans, under a sale passed in June, 1885, purporting to be under authority of Act No. 82 of 1884, for taxes charged against said property. That said sale was null and void for this: There was no assessment against said property, and if any pretended assessment should be shown by defendant, it was not in the name of any owner during the years of said assessment. Second, there was no notice of said sale to petitioners, the owners, and should any law have authorized the sale of petitioner's property, without notice, said law was invalid and violative of Art. 210 of the Constitution and the Fifth Amendment of the Constitution of the United States.

Negrotto had made a sale of said property to Mrs. Josephine Lamarque, wife of Joseph Harang, and who being then in possession of said property under said sale, was made defendant. Judgment was asked, decreeing the title of the defendant to be null and void, and condemning her to pay rent at the rate of twenty dollars per month from the date of possession. Negrotto was called in warranty by Mrs. Harang.

The district court rendered judgment in favor of the plaintiffs against the defendants, Mrs. Joseph Harang and husband, decreed plaintiffs to be the owners of the property claimed and as such owners entitled to the possession thereof, decreeing the titles of said defendants to be null and void and condemning her to pay rents to plaintiff at the rate of twenty dollars per month from January 24,

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1894, until paid and costs; further decreed that plaintiff pay defendant the sum of six hundred and sixty-eight dollars value of useful improvements, with legal interest from date of judgment, and that no writ of possession issue until said sum be paid defendant, and that there be judgment in favor of defendant against Negrotto, called in warranty for the sum of eight hundred dollars, the purchase price, with legal interest from March 10, 1894, and for one hundred dollars attorneys fees, incurred in defending the suit and for the costs recovered by plaintiffs and defendants, and all costs incurred in the call in warranty.

All the defendants appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. The property was adjudicated in June, 1885, to the defendant at a tax sale made under Act No. 82 of 1884. He received a deed on the 6th of July, 1885, and was placed in possession of the property on the 18th of August of the same year. In the deed of sale it is recited that the property had been previously adjudicated to the State under the provisions of Act No. 98 of 1882, to enforce the payment of the unpaid State taxes due on and by said property for the years 1870, 1875 and 1878. That it had been again under Act 82 of 1884 advertised for sale to enforce and collect the payment of said State taxes due on and by said property, which taxes still remained due and unpaid. That the property was duly and legally assessed in the name of Michael Walsh or Walsch for the years 1870, 1871, 1873, 1874, 1875, 1876, 1877, 1878 and 1879. That the tax collector had offered it for sale at public auction, and Dominique Negrotto being the last and highest bidder in the sum of forty-five dollars, he had adjudicated the property to him; that there were then due and unpaid taxes of the city of New Orleans on the property for the years 1871, 1873, 1874, 1875, 1876, 1877, 1878 and 1879, amounting to two hundred and ninety-one dollars and fifty cents. The receipt of the forty-five dollars was acknowledged and was declared payment in full for all taxes due to the State and city of New Orleans prior to December 31, 1880. In this deed the purchaser Negrotto declared "he assumed and promised to pay all the State and city taxes on said property for the year 1880 and subsequent years together with all interest charges, fees and commissions which may be due and unpaid."

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The deed is made upon a general printed form similar to that described in *Hoyle vs. Southern Athletic Club* (*Ante* p. 882). There is no special reference in the deed to the advertisement made of this particular property, but a general sweeping recital that "such properties were always advertised in the name of the party in whose name it was assessed (and when it was known) in the name of the present owner if different from the assessed name.

On the 16th of October, 1890, Negrotto sold the property under full warranty to Mrs. Josephine Lamarque, wife of Joseph Harang, for eight hundred dollars; four hundred dollars being cash and the balance represented by three promissory notes of the purchaser signed by her to her own order, and by her endorsed, each for the sum of one hundred and thirty-three dollars and thirty-three and one-third cents, payable respectively one, two and three years after date with interest at eight per cent. per annum from date. Mrs. Harang went at once into possession of the property and is still in possession of the same. On the 20th of January, 1894, she and her husband were cited as defendants in the present petitory action. On the trial it was admitted that the defendant, Mrs. Harang, had paid the State and city taxes upon the property in the amounts and at the dates specified in her answer; also that if a certain named witness for defendant were present he would swear that he was the "carpenter employed to make for the defendant the repairs to the house upon the property in question; that the repairs were necessary and beneficial to the property, and that he was paid therefor six hundred and fifty-eight dollars, as alleged in defendants' answer, and that he would testify to the correctness of the bill."

The taxes so admitted to have been paid by defendant were:

State taxes for 1890.....	\$8 83
State taxes for 1891.....	11 00
State taxes for 1892.....	11 46
City taxes for 1890.....	24 74
City taxes for 1891.....	18 85
City taxes for 1892.....	52 80
Total.....	\$119 67

It was also admitted on the trial that if the warrantor, Negrotto, who was absent, were present, he would testify that at the time bought the property in 1885 it was in a bad state of repair, and would not have rented for anything, that it would have brought in no revenue by way of rent up to the time he made repairs, upon it. Also that he would swear "that the amounts alleged by him in his

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answer to have been paid by him, were paid by him, and that the repairs were necessary, that he paid the sum of forty-three dollars and fifty cents, State taxes, interest, cost and charges on the property from 1880 to 1889 inclusive. The sum of two hundred and thirty dollars and seven cents, being the amount of city taxes, interest, costs and charges on the property from 1880 to 1889 inclusive. The sum of forty-two dollars and thirty-six cents being the amount expended by him to redeem the property from the State for sales made for State taxes for 1880, 1881, 1882 and 1883. That he paid two hundred and forty dollars and twenty-five cents in making necessary repairs, which repairs were necessary and beneficial to the property, and that he paid forty-five dollars at the tax sale at which he bought the property." The sale made to the State for State taxes for 1880, 1881, 1882 and 1883 alluded to in the admission are not in the record.

Michael Walsh, the owner of the property, died in 1866, his wife Mary Ann Walsh, qualified in 1867 as administratrix of his succession. She herself died in 1878. Michael Walsh and wife left as heirs, three sons, John J., Michael E., and Thomas Walsh. What their ages were at the date of their parents death does not appear.

Thomas Walsh, one of the sons died, leaving a son, Michael J. Walsh (one of the plaintiffs).

We are satisfied from the evidence that in all tax proceedings in reference to this property, it was dealt with as the property of Michael Walsh or Walsch, although he died as far back as 1866. The assessments were always in that name; the publications and advertisements were in that name, and if notices were attempted to be given, they must have been given in that name. There is no mention whatever anywhere of the succession of Michael Walsh or his heirs or his legal representatives or allusion to them.

It is claimed that no notice other than that by publication was necessary to be given in proceedings for the enforcement of delinquent taxes prior to 1880. That is true, but the publication itself, when so made as giving notice, should have to conform to legal requirements. The advertisement standing in lieu of notice should have presented on its face the data necessary to place parties in interest on their guard and should by correct descriptions as to property and owners, have conveyed information to owners that they were in danger of being divested of their property. The law con-

templated publication under a legal assessment, not publication under an assessment made against a party who had been dead ever since 1866.

Under the decisions of this court such an assessment must be held an absolute nullity, and advertisements and notices made upon it also nullities. The prescriptions pleaded do not apply to this case.

The judgment in favor of the plaintiffs for the property must be sustained. We are next called on to consider the incidental rights and obligations of the parties springing from the situation. The defendant, Mrs. Harang, complains that she should have recovered from the plaintiff the State and city taxes paid by her for the years 1890, 1891 and 1892.

In *Weber vs. Coussey*, 12 An. 536, the court, referring to taxes paid by a defendant evicted from property which he had purchased, said "they were paid for by him for the benefit of the plaintiff if the plaintiff was the owner of the property. Instead of being charged against defendant warrantor they should have been charged against plaintiff, and the writ or possession suspended until it was refunded to defendant as *negotiorum gestor* for plaintiff. It would truly be very convenient for many an owner of swamp lands around New Orleans to suffer another person (who perhaps has acquired them at tax sale) to pay the taxes from March, 1846, to December, 1856, and just before ten years' prescription has accrued to step in with his petitory action and recover the land free from all taxes."

As the defendant under our decision herein will not be allowed interest against her warrantor on the price paid by her until judicial demand, under her prior occupancy of the property, she will to the extent of that interest have really paid for the same, the value of the occupancy being taken as equal to the interest, she should not be burdened additionally with payment of taxes. Defendant claims to be entitled against the warrantor to interest from the date of the several payments of the purchase price instead of from judicial demand. From the period of her purchase up to the judicial demand in the present suit, defendant has had possession of the property freed from the payment of rent. Interest on the price can well be held to be balanced by the rent. The warrantor complains that the court has entirely ignored his claims for re-imbursement for taxes and improvements. The court assigned as its reason for so doing that no issue had been made up between the plaintiff and the warrantor.

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If by this was meant that the warrantor should have caused his answer to be served upon the plaintiff and to have been joined thereon by default and answer, we think the court erred. When the defendant under the call in warranty went into the case and assumed the burden of the action, he became substantially the defendant therein. Plaintiff was as much called on to notice his pleadings and prayer without service and default as a plaintiff is called on to notice and defend without service upon him or judgment by default, the reconventional demand of an ordinary defendant—some question was made in the earlier stages of the trial as to whether the warrantor was entitled to have service made upon him of the petition of the plaintiff in the case. The point has not been pressed, but it may be well to say that a warrantor by the call in warranty and service of defendant's pleadings thereon, is advised of the attack made upon the title he had conveyed, and it is his duty to inform himself by inspection of the character of the attack. The warrantor complains of the allowance of attorneys' fees against him in favor of defendant. He avers also that he is entitled to reimbursement from plaintiff for the taxes which he has paid for his benefit, as much so as defendant was entitled to reimbursement for those which she paid; also that he is entitled to be paid for his improvements. Had the defendant not sold the property to Mrs. Harang and been in possession of the property himself, he would unquestionably be entitled to reimbursement for both the one and the other, and he maintains that the sale to the defendant makes no change in the legal situation. He contends that when he pays back to his vendee the full price which she paid to him, included therein will be the increased value to the land given to it by his improvements at the time of defendant's purchase and therefore unless he can recover from the plaintiff, he will have to lose entirely the outlays which he made for the same, and plaintiff will to that extent enrich himself at his expense. The defendant in this suit limited her claim for improvements for those which she herself placed upon the property. In *LeJeune vs. Barrow*, 11 An. 502, judgment was rendered against the plaintiff for the value of all the improvements upon the property. Defendant obtained judgment for the entire price paid by him to his vendor. The district judge apportioned the money which the plaintiffs were condemned to pay for the useful improvements put on their land by the adverse possessors rate-

ably between the defendant and her warrantor according to the estimated value of the improvements made by each. On appeal this court said: "This seems to be equitable and we have been referred to no authority which sanctions a different doctrine. Wright (the warrantor) has to refund to his vendee (Barrow) the price which the latter paid him for the land as improved by the former. The improvements then existing enhanced this price in proportion to their value. If on the eviction of his vendee Wright has to restore the whole price and to receive nothing in return for his improvements, while Barrow recovers from the plaintiff the value not only of his own improvements but of those made by the vendor, it is obvious that Barrow would be twice paid for the same thing." The fact that Wright had disconnected himself from the property and lost possession of it through his sale to Barrow does not seem to have militated against his right in the same suit to demand from LeJeune, the plaintiff therein, the same claims which he could have advanced were he the defendant in possession. We think the present suit the proper occasion in which Negrotto should advance his claims, and that he should not be remitted to a separate future independent suit against the plaintiffs. *Laizer vs. Generes*, 10 Rob. 179.

If plaintiffs have any defences or counter claims they can either advance them directly or by amending their pleadings. Circuity of action will thus be avoided, and the provisions of Art. 210 of the Constitution relative to repayment of price to purchasers at tax sales on the setting aside of their titles can be made effective. The plaintiff in this case took no exception to the form of proceeding, but voluntarily litigated the issues tendered. We think Negrotto is entitled to recover from the plaintiffs the taxes he has paid on the property for the benefit of the plaintiff, not including penalties and costs. We are not prepared to say that the amount expended by the warrantor for improvements made as far back as those which warrantors claim for are chargeable against the plaintiff. He may have derived and may derive no benefit from them. We are inclined to think that twenty dollars per month for rent may have been too large an amount with which to charge the defendant in the interval between the bringing of this suit and the surrender of possession of the same. We should judge that the value of the occupancy of the house is to some extent due to the moneys expended upon it by the defendant or the warrantor, or both. That fact should have some

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weight in fixing the rent during the period referred to. We think the ends of justice will be best subserved by remanding the cause to the District Court so as to adjust on some points the incidental rights of the parties, particularly as the District Court has not passed upon some of them. We think the judgment in favor of the plaintiffs decreeing them to be owners of the property which they claimed, and ordering defendant to pay rent from judicial demand until delivery of possession of the same is correct. We think the amount as now found to be paid per month as rent should be set aside, and that the amount for the same should be fixed *de novo* by the District Court. The judgment in favor of the defendant against the plaintiffs not being objected to must, so far as it now stands, be affirmed, but it must be amended by decreeing that defendant should recover from the plaintiffs additionally the sum of one hundred and nineteen dollars and sixty-seven cents for taxes paid by defendant on the property. We think that Negrotto should recover judgment against the plaintiffs for the amount of taxes, less penalties and costs which he has paid upon the property. 33 An. 531; Stafford vs. Twitchell, 35 An. 487; Davenport vs. Knox, 35 An. 1086; Hickman vs. Dawson, 37 An. 357; Fishel vs. Mercier. That he should also recover judgment against the plaintiffs for such amount for improvements made by him as shall be found to enure to their benefit. The judgment in favor of defendant against her warrantor for attorneys' fees should be set aside. Melancon's Heirs vs. Robichaud, 19 La. 357; Williams vs. LeBlanc, 14 An. 757; Hale vs. New Orleans, 13 An. 499; Laborde vs. The City, 13 An. 327; Sarpy vs. New Orleans, 14 An. 311; Late vs. Armorer, 14 An. 826.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed in so far as it renders judgment in favor of the defendant, Mrs. Josephine Harang, against her warrantor, Domingo Negrotto, Sr., for one hundred dollars for attorneys fees.

It is further ordered, adjudged and decreed that said judgment be amended by striking out twenty dollars as the amount of the monthly rent for which defendant is chargeable in favor of the plaintiffs, the amount of the monthly rate being left open to be fixed and determined by the District Court upon the remanding of the cause to it as hereinafter directed, and by making the payment of

 Succession of Seymour.

said rent terminate upon surrender of the property to the plaintiffs by the defendant.

It is further ordered, adjudged and decreed that the judgment be amended condemning plaintiffs to pay to defendant, in addition to the sum of six hundred and sixty-eight dollars, value of useful improvements, the additional sum of one hundred and nineteen dollars and sixty-seven cents, amount of State and city taxes paid by the defendant for and on account of the property recovered by plaintiffs, the said two amounts to bear interest from July 8, 1895, and by ordering that no writ of possession issue herein until the payment of these two sums to the defendant.

It is further ordered, adjudged and decreed that this cause be remanded to the District Court in order to hear and pass, in accordance with the views herein expressed, upon the claims set up by the warrantor against the plaintiffs, and to fix and determine the amount of monthly rent for which the defendant shall be chargeable from judicial demand upon her, until surrender of the property.

It is further ordered, adjudged and decreed that the judgment appealed from, except in so far as it is annulled and amended herein, and in so far as left open for determination by the District Court on the remanding of the cause as herein directed, be and the same is affirmed, costs of appeal to be divided between plaintiffs and defendant.

 No. 12,085.

SUCCESSION OF FANNIE SEYMOUR, WIDOW OF WILLIAM R. MILLS.

Testaments are revocable at the will of the testator until his decease.

When a prior will has been made the testator has a right up to his death to formally announce that he has changed his mind.

Art. 1692, C. C., does not require that this act of revocation should itself be a testament; it only requires that it should be "an act" in "one of the forms prescribed for testaments and clothed with the same formalities."

A PPEAL from the Civil District Court for the parish of Orleans.
Ellis, J.

Chretien & Suthon, Public Administrator for Appellee.

Henry Chiapella and Frank Zengel, Testamentary Executors, Opponents, for Appellants.

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Argued and submitted May 4, 1896.

Opinion handed down May 18, 1896.

The opinion of the court was delivered by

NICHOLLS, C. J. J. B. Vinet, public administrator, alleging that Fannie Seymour, widow of Wm. R. Mills, had died on the 6th of January, 1896, in the city of New Orleans, leaving no heir, present or represented in Louisiana, that her succession was vacant, applied for letters of administration.

On the 6th January, 1896, Peter S. Anderson and two others filed a petition in the District Court, in which they alleged that the said Fannie Seymour did, on August 7, 1895, by act before Zengel, notary execute a will in the nuncupative form, in which they were appointed jointly as executors with seizin; that they accepted said trust and desired to qualify as such. That the succession has been opened by the public administrator, as a vacant estate, and he had applied for letters of administration. That the last will of the deceased should be filed, registered and ordered executed, and they should be appointed executors, and the prayer of the public administrator should be rejected.

The public administrator answered the rule. He admitted that the deceased had, by act before Zengel, executed what purported to be a will in nuncupative form, but he alleged that subsequent to the execution of said alleged will, the deceased executed on November 30, 1895, an express act of revocation of all wills and testaments, by act before Upton, notary public; that the status of the succession was thus fixed as an intestate succession and there existed no reason why respondent should not be appointed administrator. He prayed that the rule be discharged and that he be appointed administrator. He annexed to his answer a copy of the act of revocation.

Plaintiffs in the rule filed what is styled an "amended petition and opposition" in which they amplified their opposition to the application of the public administrator. They denied that the deceased had died intestate, and averred that she had left a last will (the will before Zengel, already mentioned), in which they had been appointed executors, and for which probate they had petitioned. They averred that the pretended act of revocation executed before Upton did not, and could not, revoke or recall the said testamentary dispo-

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sitions of the deceased and was null and void and of no effect, for the following reasons, viz:

1. Said act was not made in one of the forms prescribed for testaments and clothed with the same formalities.

2. The witnesses did not have the legal qualifications.

3. The requisite number of witnesses for cases of blindness of the party, dictating the instrument, were not present; said Mrs. Mills being blind.

4. Erasures and words added by the hands of another were not approved by said Mrs. Mills before signature, and said erasures and addition of words took place after signature outside of the presence of the party dictating the instrument.

5. The instrument was not written at one and the same time, without interruption or turning aside to other acts, but, on the contrary, one of the witnesses absented himself during the confession, after the beginning and prior to the signature of the same, and remained absent for a considerable time, which absence taints the instrument with nullity.

6. Said instrument is not a testament or act of last will, disposing of property *mortis causa* but a notarial act, unknown to our system of laws, which can not validly revoke, annul and supercede the prior testamentary dispositions of testatrix.

7. The notarial act being invalid and illegal, the nuncupative testament of testatrix, under which the opponents claim remained in full force and effect, and should be upheld accordingly.

On January 20, 1896, the case came up for trial on the application of the public administrator to be appointed as administrator. The public administrator offered the act of 30th November, 1895, passed before Upton, notary. The court admitted it as *rem ipsam*. Opponents offered in evidence the will of the deceased, passed on the 7th August, before Zengel, notary. Objection was made by the public administrator on the ground that it had been revoked by the subsequent act before Upton, notary. The court admitted the document as *rem ipsam*, stating it would pass upon the act of revocation after all the evidence was in; that after seeing the act of revocation it reserved its right to rule upon the absolute admissibility of the will offered.

Opponents having offered to prove by witnesses the allegation of their amended opposition, the public administrator objected to all

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parole testimony, to vary or contradict the recitals of the notarial act of revocation, passed before Upton, notary, on the ground that the act was valid in form and made full proof of itself and fixed the *status* of the succession, and it could not be attacked collaterally. The court reserved its ruling until after hearing the testimony, and several witnesses testified as to the circumstances connected with the passing of the act of revocation. At the close of the testimony the court ruled upon the objection to any testimony in the case which had been raised. It "ruled that the objection was well taken; that the necessary parties were not before the court to enable it to pass a definitive judgment as to the validity *vel non* of the act of revocation or of the testament itself—the court was of the opinion that the judgment asked was in regard to the administration in the first instance; that the primary administration or care of the succession would have to be based upon the face of the records as made, to-wit: the will and the act of revocation; that parole evidence could not be received at that junction of affairs on the issue then before the court to assail the validity of the act of revocation; that if there were in the act of revocation itself any defects, of course, the parties would not be concluded from showing that on the face of the papers." To this ruling, opponents excepted and reserved a bill.

The court rendered judgment against the opponents and in favor of the public administrator, dismissing the opposition and appointing the public administrator administrator of the succession. It reserved to all parties in interest the right to attack by direct action, either the testament of the deceased or the act of the revocation.

Opponents appealed.

In their brief, they say:

"The District Judge having excluded all parole evidence going to assail the validity of the notarial revocatory act before Upton, notary public, for *non* compliance on his part with legal formalities, the controversy narrows down to this legal proposition: 'Can a testament be revoked in Louisiana by a pure notarial act which is not itself a will because not containing any disposition of property in favor of instituted heirs or legatees, though it be drawn up with the apparent formalities of a nuncupative testament by public act.'"

Counsel say: "This question is *res nova* in this State for it has not happened before (so far as we have seen), that a person who had

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made a testament ever called upon a notary to receive a declaration of annulment thereof without making any other disposition of property. It is remarkable that the testatrix of August, who had made so many eccentric dispositions *mortis causa*, should in November following, dictate a notary public the simple declaration, 'I do hereby revoke all former wills heretofore made by me.' If such an act which the notary himself styles an 'act annulling all wills and testaments' and which no one claims to be a will, is sufficient in Louisiana, as it certainly is in France, under the express provisions of Art. 1035 of the Code of Napoleon, to place the testatrix back in a position of hesitancy, then the public administrator rightly held that the succession was vacant and intestate. Opponents, on the contrary, are entitled to the probate of the will of August 7, 1895, and to qualify as executors thereunder, if the said revocatory act is unknown to our system of laws, and can not validly revoke the prior testamentary dispositions of the deceased." * * * Our legal proposition is:

"1. An act of last will can not be revoked expressly in Louisiana, except by a subsequent and different act of last will.

"2. A purely revocatory act which makes no disposition of property, provides for no legatees, instituted heirs or testamentary executors, is not a testament or act of last will.

"3. Hence the revocatory action is worthless, even though to all outward appearances it be a will since it has neither the substance nor elements of a will."

The only question submitted to us is, whether, in order that a testator should make an effective revocation of prior wills made by him, it be necessary not only that he should formally declare, in writing, in an act in proper form, clothed with proper formalities, that he revoke all prior wills, but that in the act in which he makes such formal declaration he should, by express affirmative declarations, dispose of his property, either universally or by universal title or by particular title.

The law of Louisiana on the subject of the revocation of wills lies within very narrow compass. It is as follows:

ARTICLE 1690. "Testaments are revocable at the will of the testator until his decease. The testator can not renounce this right of revocation nor obligate himself to exercise it only under certain words and restrictions, and, if he does so, such declaration shall be considered not written."

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ART. 1691. "The revocation of testaments by the act of the testator is express or tacit, general or particular. It is express when the testator has formally declared, in writing, that he revoked his testament, or that he revokes such a legacy or a particular disposition.

"It is tacit when it results from some other disposition of the testator, or from some act which supposes a change of will.

"It is general when all the dispositions of a testament are revoked.

"It is particular when it falls on some of the dispositions only without touching the rest."

ART. 1692. "The act by which a testamentary disposition is revoked must be made in one of the forms prescribed for testaments, and clothed with the same formalities."

Opponent's contention is substantially that in Louisiana the right of revocation of a will is not an absolute right, but one conditioned upon or made contingent upon the testator's making a new will containing express affirmative new disposition of property; that the testator must not only expressly revoke, but expressly replace; that he must not only demolish, but he must actively reconstruct. We find nothing in Art. 1691, O. C., justifying that proposition. What is the declaration in the act of revocation which the law, in that article, requires to be made, in order to operate a revocation? There is no uncertainty on that point; it is simply "a formal declaration by a testator that he revoked his testament," that and nothing more. Were we to require more than this we would have to add to the law instead of taking it as it is.

The testator having, in a prior will or in prior wills, announced what, in the absence of subsequent counter declarations, would be taken to be his last wishes, he has the right up to death to formally announce that he has changed his mind, and to declare that the disposition of the prior testaments should no longer be taken as expressive of his will. As the prior testament was essential to be made in order to bring about in respect to the disposition of his property a departure from the disposition which the law itself would make, so the only rational method of bringing himself back into acquiescence with those legal dispositions, would simply be by undoing what he had done before. The moment this was done the law would, by its own force control the situation, there would be no necessity for

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any expression of will on this subject. There would instantly be a *restitutio in integrum*.

Article 1692 does not require that the act of revocation should itself be a "testament" as opponents argue—it only requires that it should be "an act" in "one of the forms prescribed for testaments and clothed with the same formalities."

There are in this State different forms or classes of wills. There are nuncupative or open testaments, mystic or sealed instruments and olographic testaments, and nuncupative testaments, are subdivided into nuncupative testaments by public act, and nuncupative testaments by private act. Each form of testament is subjected by law to the observance of certain specified formalities or "solemnities." Whenever an act is presented as an act of revocation of a will, all that is necessary in order that it should hold good, is that the act in which the required formal declaration of revocation is found, shall on examination, prove to be in one of the forms provided for testaments and clothed with the same formalities.

Opponents say that such a construction would be unreasonable. They ask why should the Legislature have ordained that the revocatory act should have the shadow and not the substance of a will? Why depart from the rather too liberal dispositions of Art. 184 of the Code of 1808, as well as from the amendments proposed by the commissioners appointed under the Act of 1822 to revise that code, and from Art. 1035 of the Code Napoleon? Was it not because we wanted to return to first principles, since under the Roman law a "testament" could only be revoked by another "testament?" Would not such construction, they say, be liable to the criticism of tautology. For is not saying that the words "the act must be made in one of the forms prescribed for testaments" refer only to the general appearance of the instrument and not to its very substance, equivalent to saying "that it must be clothed with the same formalities?" Why should the two sentences be placed in juxtaposition if they both contemplate the same object? Is it not evident that the words "must be made in one of the forms" have a meaning quite distinct from the words "clothed with the same formalities?" And since the latter deals with the outward appearance of things the former necessarily have a deeper significance.

Article 184 of the Code of 1808 provided that: "In revoking a testamentary disposition less solemnity is required than in making

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it. Thus a testament may be revoked by another testament, or by a codicil or by any other act received by a notary in presence of two witnesses expressing a declaration of a change of will. In like manner a codicil may be revoked by a new codicil, or by a testament or by an act passed as above specified."

When the Code of 1808 was revised, the Code Napoleon was in existence, and the law bearing upon the subject of the revocation of wills was embodied in Art. 1085 of that Code, and it read as follows:

"Les testaments ne pourront être révoqués en tout ou en partie que par un testament postérieur ou par un acte devant notaires portant déclaration du changement de volonté."

In dealing with the subject of the revocation of wills in the revision of the Code of 1880, through the adoption of that of 1825, our lawmakers did not, in Art. 1685 of the Civil Code (now Art. 1692) think proper to follow the language of Art. 1085 of the Code Napoleon. The phraseology of the French article had enabled some strict constructionists in France to insist that inasmuch as by it it was declared that "testaments can be revoked in whole or in part only by a subsequent testament or by an act before a notary public declaratory of a change of will," and inasmuch as by law the word "testament" had been given a fixed definition declaring it (Art. 895 C. N.) "an act by which a testator disposes for a time when he shall no longer exist, of the whole or of part of his property, and which he can revoke," therefore it was necessary, in order to bring about a revocation when attempted, in any other manner than by an act before notary, that the act of revocation should, at the same time, be one making a disposition of his property, either partially or entirely.

We scarcely think that the framers of the French law intended, under Art. 1085 of the Code Napoleon, to make the revocation of a will by a testator dependent upon a new affirmative disposition of his property or to impose limitations upon the power it itself of revocation. Had this been their intention we would have found the same obligation repeated in that portion of the article allowing a revocation through an act before notaries. We find no such obligation imposed upon the testator, when, in that form, he revokes his former will. All that is required of him under such circumstances is to make a formal declaration of a change of will (*changement de volonté*), and not a declaration of a new disposition

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of the property (*disposition de ses biens*). The necessity for "a new disposition of property" thus insisted upon in France when the act of revocation was sought to be made through an act under private signature, rests exclusively upon a supposed obligation of blindly following the very letter of the law as to form. Our own Legislature doubtless saw to what result the injudicious use of the word "testament" had led up, and, in our opinion it left that word out precisely to avoid a similar contention being made here. We not only departed from the French article in the change just referred to, but we did so also in respect to the requirements of the "notarial act" when one was to be resorted to as furnishing the evidence of a change of will. Under the Code Napoleon this act is referred to simply as "*un acte devant notaires*," while with us the act must not only be an act before a notary, but it must be in the form prescribed for testaments and clothed with the same formalities.

The dominant idea with us is obviously that as by law the original testamentary dispositions of a person have, in order to be given effect to to find expression and be evidenced in a fixed designated way so a change of will in respect to those dispositions has to find expression and be evidenced in like solemn manner, but on the other hand that to this change of will (*changement de volonté*) no force and effect has to be given when so evidenced.

Our law makers have manifested no desire to give a preference to testamentary successions over legal successions. On the contrary, the disposition of property at death, as fixed by the law itself, was deliberately adopted as the system most consistent with justice and equity, and that system is only departed from by strict adherence to well defined rules. There is no reason, therefore, leading us to suppose that the law maker has attached, as a condition to the revocation of an existing will that the testator revoking the will should be forced to affirmatively make a new disposition of his property. Opponents look upon the words "form" and "formalities" as synonymous, but in this there is error.

If a person on being told that another who had just died had left a will, should ask in what form this will was, the answer would, at once, be either that it was an olographic will, a nuncupative will by public act—a nuncupative will by private act of a mystic will—if he were to then ask whether all the formalities required by law in the premises had been fulfilled, the person to whom this question was

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addressed would instantly know and recognize that this was not a repetition of the first, but an entirely new and distinct question, calling either for an affirmative answer or for the specifying of some particular act or acts, which had either been omitted by the testator, the witnesses, or the notary, or all of them, or had been illegally and improperly performed.

We have not been called on to examine the act of revocation which is relied on in this case, with respect to its form or as to its being open to attack through extrinsic evidence.

We understand it to be conceded that the act (leaving aside the question of its not containing affirmative declarations as to the disposal of the testator's property) conforms as to form with the legal requirements for a nuncupative will by public act, and that it is on its face, clothed with the formalities required for such a testament. We understand it to be conceded that the District Court was justified in making the rulings it did, unless it was wrong in overruling appellants in the position taken by them before it and before this court, that by reason the absence of new direct affirmative disposal of her property by the testator, Fannie Seymour, in the act of revocation passed before Upton, notary, withdrew the act (on its face) from being taken as an act of revocation, thus leaving the original will in full force and effect. We think the District Court took a correct view of that particular question. The effect of our so holding is that the judgment appealed from must be affirmed.

The judgment appealed from being, in our opinion, correct, it is hereby affirmed.

No. 12,089.

MRS. E. H. GANNON VS. NEW ORLEANS CITY & LAKE RAILROAD
COMPANY AND NEW ORLEANS TRACTION COMPANY, LIMITED.

In an action for damages for a death by wrongful act, failure of the plaintiff to connect by proper testimony all the necessary facts and circumstances, will not justify the Supreme Court in supplying such testimony by inferences.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Joseph N. Wolfson for Plaintiff, Appellant.

Gannon vs. Railroad Companies.

Denégre, Blair & Denégre and Hugh A. Bayne for Defendants,
Appellees.

Argued and submitted April 9, 1896.

Opinion handed down May 4, 1896.

Rehearing refused June 1, 1896.

Action for fifteen thousand dollars for damages for death of minor child caused by the alleged gross negligence of defendant's company. There was judgment for defendant and plaintiff appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. On the 29th of April, 1894, Gladys Gannon, a little girl, five years and nine months old, died at the Hospital, in New Orleans, by reason of having had her thigh crushed or broken the day previous by one of the wheels of a car belonging to the New Orleans City & Lake Railroad Company. The present action is one by the mother of the child seeking a judgment against that company and the New Orleans Traction Company for fifteen thousand dollars damages as resulting from the injuries so received. Plaintiff asks five thousand dollars damages in her own right and ten thousand dollars damages under and through the right of action which the child herself had. The case presented to us is one of those distressing accidents constantly occurring in a crowded city upon the streets of which railway companies have been permitted to operate their cars. We recognize the fact that the driver of a car may be called upon to exercise much greater caution where he sees ahead of him a child on or near the track upon which he is driving than he would were he to see a grown person occupying the same position. The accident in this case occurred at the corner of Constance and Bordeaux streets. The former is quite a narrow street on which the defendant company, under a franchise from the city, has run one of its tracks. That track was then used for horse cars going from the upper to the lower part of the city. Constance street is parallel to and Bordeaux is perpendicular to the Mississippi river. On the morning of the accident, about 9 o'clock, the mother of the child, who occupies a house between Bordeaux street and the street below, on the side of the street known as the lake side of the

street, in contradistinction to the opposite side, known as the river side, sent her over to a grocery at the upper corner of Constance and Bordeaux streets, on the river side of Constance. She went alone with a basket upon her arm to purchase charcoal at the corner stand. She had frequently before been sent alone on similar errands without injury. The mother watched her but from the window of her house. The child entered the grocery, made the purchase and came out upon the sidewalk with another child supposed to be the daughter of the groceryman. She had a sunbonnet upon her head and the basket on her arm. Stopping a moment on the sidewalk to take from the other child some fruit handed her, she attempted to pass across the street.

After a careful examination of the whole testimony, we have reached the conclusion that if any blame at all could attach to the driver it would have been found in the interval of time between the crossing of the gutter by the child and her striking the mule or car. The car was being driven slowly—the driver had his hand upon the brake prepared to act as soon as anything should arise calling for action. It would be utterly unreasonable to exact that the mere presence of a child five or six years old upon the sidewalk or banquette with a basket upon her arm should force the driver of a street car to bring it to a dead stop upon the bare possibility that it might leave the place it was then occupying securely, to either walk or run suddenly into danger. There was nothing, in our opinion, in the situation to indicate to the driver that the child would attempt to cross the street. The witness Huddleston and the driver both state this to have been the fact. In reference to occurrences taking place after the child moved across the gutter, Paddock, another witness, says he applied the brake before she struck the mule or car. He also says that he saw the child all the time and did not see Huddleston at all. We do not know whether the witnesses were separated or not, but the driver seems to have a thorough knowledge of the child's position and actions. We do not attach to Huddleston's statement that Paddock was looking at him at the time of the accident the same importance that plaintiff's counsel does. It is directly contradicted by Paddock, and the precise instant that the driver may have looked in the direction of Huddleston, if he did so at all, is a matter too liable to mistake to have much weight—nothing is so rapid and shifting as glances from the eye. Huddleston

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was on the upper side of Bordeaux street, and there was nothing in his presence there calculated to call attention to him. Had he been on the lower side the driver might have supposed he was waiting to take the car. We understand the evidence to show that the child left the door of the grocery, walked diagonally to the corner of Constance and Bordeaux streets—paused there to take some fruit from a companion child and then walked perpendicularly across the street to the track—a distance of eleven feet and a half. The driver says she ran across. Montgomery, a witness, that she walked; but whether she walked or ran the driver says that as she approached, and before she struck the mule or car, he applied the brakes. We can not say, under the evidence, that he did not act as promptly as the occasion called for. There was certainly little time for action. Possibly a quick, loud call to her from the driver might have caused the child to halt, and been more efficacious than an application of the brakes, but no suggestion was made, either in the pleadings or argument, that he was guilty of negligence or omission of duty in not having done so. The precise point where the collision took place has not been established. The mother and Huddleston were on the opposite side of the street and their views were masked by the passing of the mule. We think, however, that the child must have first come into collision with the mule, but exactly where we can not say. The establishment of that fact is important only in testing whether or not the condition of the brakes should enter as a factor in the determination of the cause. Paddock says the shoe of the car was worn and that the car slipped possibly two feet further than it should. His answers are not as clear as would be desirable as to the cause of the slipping, as he refers to the slippery condition of the track on that morning as one of the causes. In answer to a question whether he could have avoided the accident had the brake been in good order, he answered positively he could not. This answer was evidently supposed by plaintiff's counsel to have been made with reference to the driver's claim that the child struck the dashboard and did not strike the mule, for the question was repeated to him, "If the brake had been in good order could you have avoided the accident had the child struck the mule?" To this he replied, Well, then he might. The question as again repeated was awkwardly put, but the obvious meaning of it was, "If the child had struck the mule, could you have avoided the accident

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with the brakes in the condition they were then in." To this he replied, he could not say that; but he certainly could have done so if the child had struck the front part of the mule—but he immediately added, there was a doubt in his mind; the car might have slipped for all he knew.

Under the evidence, it is difficult for us to fix with certainty what part the bad condition of the brake had in not preventing the accident. The driver says the car ran about six feet and a half before it came to a dead stop—that it slipped two feet and a half further than it should have done after the brakes were on. Did, or did not, the fact that the car stopped make any difference in the actual result? Did the slipping cause the injury, or merely aggravate it, and if it aggravated it merely, to what extent did it do so? Would the accident have resulted in something short of death had the car been stopped earlier? Would not the same result have occurred had the car stopped two feet short of where it did?

The District Court thought the case too close a one to justify a judgment—that the evidence did not come up to the standard of the "reasonable certainty" exacted from a plaintiff.

We adopted as correct the statement of the witness Montgomery that the first point at which the collision occurred was about the flank of the mule. This brings the case within the statement of the driver that "perhaps" he might have stopped the car in time to have prevented the accident had the shoe of the car been in good condition. Had the evidence shown, with reasonable certainty, that the distance between the point of original collision and the wheel of the car was such as to have made it possible for the accident to have been avoided had the car been supplied with proper shoes, we would have reversed the judgment, but one of the links in plaintiff's evidence is missing, and we do not feel authorized to supply it by inferences. Plaintiff has the burden on her throughout. She has to connect the defective shoe with the accident, and establish affirmatively that had the shoe been in good condition the accident could have been prevented. The effort of both plaintiff and the defendant seems to have been directed to the conduct of the driver, instead of to the defectiveness of the appliances and its results.

The case comes before us on appeal from a judgment of the District Court adverse to the plaintiff. We see no error in that judgment and it is hereby affirmed.

State vs. Hart.

No. 12,133.

THE STATE VS. MAURICE J. HART.

A PPEAL from the Criminal District Court for the Parish of Orleans. *Ferguson, J.*

M. J. Cunningham, Attorney General, and *Charles A. Butler*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

T. J. Semmes, Evans & Dunn, *A. D. Henriques, Rogers & Dodds* and *James A. Walker* for Defendant, Appellant.

Submitted on briefs April 11, 1896.

Opinion handed down April 20, 1896.

Rehearing refused June 1, 1896.

The opinion of the court was delivered by

MILLER, J. For the reasons assigned in the case of *State vs. Hart* No. 12,132, it is ordered that this appeal be dismissed.

No. 12,134.

THE STATE VS. M. J. HART.

A PPEAL from the Criminal District Court for the Parish of Orleans. *Ferguson, J.*

M. J. Cunningham, Attorney General, and *Chas. A. Butler*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

T. J. Semmes, Evans & Dunn, *A. D. Henriques, Rogers & Dodds* and *James C. Walker* for Defendant, Appellant.

Submitted on briefs April 14, 1896.

Opinion handed down April 20, 1896.

Rehearing refused June 1, 1896.

State vs. Hart.

The opinion of the court was delivered by

MILLER, J. For the reasons assigned in the opinion in the case of State vs. Hart, No. 12,132, this day delivered, it is ordered that the appeal in this case be dismissed.

No. 12,132.

STATE OF LOUISIANA VS. MAURICE J. HART.

The judgment refusing the change of venue applied for by the accused is not appealable apart from the appeal from the sentence, accorded him by the Constitution and laws. Constitution, Article 81; E. S. S., 1081.

A PPEAL from the Criminal District Court for the Parish of Orleans,
Ferguson, J.

M. J. Cunningham, Attorney General, and *Chas. A. Butler*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

T. J. Semmes, Evans & Dunn, A. D. Henriques, Rogers & Dodds and *Jas. C. Walker* for Defendant, Appellant.

Submitted on briefs April 11, 1896.

Opinion handed down April 20, 1896.

Rehearing refused June 1, 1896.

The opinion of the court was delivered by

MILLER, J. The accused appeals from the judgment refusing his application for a change of venue. The State moves to dismiss the appeal on the ground that the accused is allowed the appeal from the sentence, not from an interlocutory order or judgment.

The general principle is that errors in the orders or decisions of the lower court, made in the progress of the suit, must be presented to the appellate court on the appeal from the final judgment. If it were otherwise, and every question in the suit could be made the subject of an appeal, it is easy to see that delayed until each appeal should be determined, the final decision would admit of indefinite procrastination. The rule restricting the appeal to that from the final judgment inflexible in civil cases, with exceptions pointed out

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by the Code, is enforced as our examination impresses us, without qualification, unless modified by statute, in criminal cases. Thus, as Mr. Wharton puts it, "Error can be taken only after final judgment." Wharton's Criminal Practice, Sec. 3217. Prior to the Constitution of 1845, this court had no criminal jurisdiction, hence our decisions have been made with reference to the provisions in the constitutions beginning with that of 1845. But still, all the decisions affirm the general rule under examination as to appeals. The early case of Hornsby arose before the Constitution of 1845. In that case the Court of Errors and Appeals, called without objection from the State to entertain an appeal by the accused from an interlocutory judgment, overruling his motion in arrest, announced the opinion that the appeal could be taken only after verdict, judgment and sentence. In that case the court heard the appeal, but stated if the State had moved to dismiss, the motion would have been sustained. If the right to appeal exists in this case, it must then be derived from the Constitution or laws. *State vs. Hornsby*, 8 Robinson, 588; *State vs. May*, 9 An. 69; *State vs. Pratt*, 9 An. 157; *State vs. Johnson*, 36 An. 406; *State vs. Wilkins, Jr.*, 37 An. 62.

The argument for the accused maintains that the appeal in this case derives support from the article in the Constitution defining our jurisdiction in criminal cases. It is claimed there is an important change in the jurisdictional provisions on this subject in our present Constitution. The Constitutions of 1845, 1852, 1868 and 1880, it will be found, are substantially alike, except in one particular, in our view, not exerting any influence in this discussion. The jurisdiction in criminal cases is defined as extending on questions of law alone, to all criminal cases punishable with death or imprisonment at hard labor. Under the Constitution of 1868 the appeal was restricted to cases in which the punishment specified was actually imposed. Article 74. Under the Constitutions of 1846, 1852 and 1879, actual imposition of the punishment was dispensed with, and the appeal allowed, when the offences were of the character to admit of the death penalty or imprisonment at hard labor. Articles 63 of 1845, 62 of 1852, and 81 of 1879. The language in our present Constitution, like that of 1845 and 1852, in conferring criminal jurisdiction on this court is, that in criminal cases the jurisdiction exists on questions of law alone, when the punishment of death or imprisonment at hard labor may be inflicted or a fine exceeding three hundred dollars is imposed.

All these articles simply define the class of cases appealable to this court. It is manifest, we think, that the articles do not deal at all with the stage of the suit when the appeal is to be taken. That was left to be determined on general principles or by statute, and when our present Constitution came into existence our jurisprudence and our statute both fixed the right of appeal of the accused as arising only on sentence. We can find nothing in the organic law to sustain the contention that the appeal from the interlocutory judgment is give the accused by the Constitution.

We turn to our statute on the subject, which has been in existence and under judicial notice for more than forty years, now section 1031 of the Revised Statutes. It provides: "If final judgment has been rendered on any indictment where the punishment of death or hard labor may be inflicted, an appeal may be taken to the Supreme Court." The statute follows the article of the Constitution as to the cases appealable, and supplies what the Constitution leaves untouched, the time for the appeal. The statute needs no comment. Nor can we perceive the Act No. 30 of 1878 in any respect modifies the statute. "In all case where appeals are allowable under the Constitution" the act of 1878 directs the appeal may be verbal or in writing; the act further specifies the time within which the application is to be made, and contains other provisions as to the return day and filing of briefs. It remains, we think, that our statutory legislation gives the accused the appeal only from the sentence.

We can not appreciate that the application for a change of venue is an independent issue, not a part of the suit in which the application is made. If an incident of the suit like other questions arising in the course of the trial, it comes here on the appeal from the sentence, or it can not reach this court at all. That an application relating to the mode of trial is an incident of the suit, we think is obvious and the application to change the *venue* manifestly refers to the method of trial. This court has recognized the right of appeal by the State from an order changing the *venue*. This decision was on the theory that the judge without observing the requisites of the law had directed the change. It was a final judgment in this sense; it ended the suit in this court from which the change was ordered. Besides, there it was the appeal of the State not the accused. In our view the application for the change of venue is to be viewed as incidental to the suit, part of it and not an

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independent proceeding, the subject of a separate appeal. This view is strongly enforced by the obstruction in the administration of justice that would result if an appeal from the refusal to change the venue was allowed on the theory that the petition for a change of venue was in itself a suit carrying the right of the accused to delay the trial for the offence until the determination of the appeal from the decision on the issue as to the venue.

We have considered the cases cited on behalf of the defendant. The decisions in 37 An. 675, *State vs. Robinson*, and 38 An. 633, *State vs. Oliver*, and 16 An. 159, *State ex rel. Shelton vs. Judge*, are urged as conclusive in his favor. The case in 16 An. was an appeal from a *mandamus* issued by the District Court compelling a magistrate to examine parties on a charge in reference to which they had given bonds to secure their appearance before the District Court. There was no discussion in the case to shed any light on the point involved here. The court held the *mandamus* might work irreparable injury, and maintained the appeal. In 38 An. 633 (*State vs. Oliver*), the accused claimed he was entitled to his discharge under the verdict of the jury and the arrest of the judgment ordered on his motion. If the prisoner's contention was well founded he could not be tried again. Under the "peculiar circumstances of the case" a qualification well calculated to weaken the authority of the decision, the court maintained the appeal of the accused from the judgment ordering another trial. A decision of the same court, reported in 37 An. 82, was made under analogous circumstances. The accused conceived he was entitled to be relieved of any further prosecution of the charge because the court had discharged the jury. Without waiting for a second trial he interposed the plea of "once in jeopardy" and appealed from the judgment overruling the plea. The court, affirming with emphasis that the accused could appeal only from sentence, dismissed the appeal. Whatever authority may be extracted from 37 An. 675 is, we think, dispelled by the subsequent decision. Other cases cited on behalf of the defendant are appeals by the State, one type of which is the case of *State vs. Brown*, 27 An. 236, in which, too, the appeal was dismissed on the ground no sentence had been imposed. So far as the State is concerned, it is allowed to appeal from judgments improperly sustaining motions in arrest, or similar errors subsequent to verdict, when nothing remains except to sentence (*State vs.*

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Ellis, 12 An. 390), but we can not see that this class of cases has any tendency to give the accused a right to appeal from incidental rulings or interlocutory orders made in his case. Again, there is cited in the brief, 42 An. 318 (*State ex rel. Poché vs. Judge*), a civil suit in which an appeal was allowed from the judgment overruling the plea to recuse the judge. Other and perhaps stronger decisions in civil cases might be cited to show the application of the test of irreparable injury applied in civil cases, to determine the right of appeal. The exposition that irreparable injury can not, even in a civil case, be predicated on an order with reference to the mere mode of trial might also be furnished. *Hawkins vs. Livingston*, 10 Martin, 443. The question here, however, is as to the right of the accused to appeal in a criminal case, and decisions in civil cases afford but limited, if any assistance.

We have given this question a careful examination and believe our attention has extended to all the authorities and phases of the discussion on behalf of the defendant. If the accused stands in the attitude depicted in other parts of the briefs to which our investigation has been in some degree directed, in making up our decision on the motion, he is not, by the dismissal of his appeal, deprived of the guarantees of a fair trial the Constitution and laws secure and courts enforce. But we can not, in response to the argument forcibly urged on us with respect to the grounds for the change of venue, recognize an appeal, contrary, as we believe, to the Constitution, laws and the fixed jurisprudence of the State.

The application is therefore dismissed.

DISSENTING OPINION.

WATKINS, J. This appeal was granted from a decree of the trial judge disallowing the defendant a change of venue, and the motion to dismiss is grounded upon the theory that a defendant is not entitled to an appeal until after verdict and sentence.

The theory of the appellant is that the decree of the judge refusing his application for a change of venue is of the nature of a final judgment disposing of the issue and preceding the trial, and the review of which concerns the accused, but with which the jury has nothing whatever to do.

That, if he has no recourse by separate appeal, his redress is

irretrievably lost, as it has become merged into the verdict and judgment, and must be thereafter treated only as an incident of the case.

Counsel for the State relies mainly upon the provisions of Revised Statutes, Sec. 1001, which are as follows, viz.:

"If final judgment has been rendered upon any indictment where the punishment of death, or imprisonment at hard labor may be inflicted * * * an appeal may be taken on behalf of the accused from such judgment, returnable to the Supreme Court, as in civil cases," etc.

And from the terms of the statute he draws the inference that an appeal is not permitted to the defendant at any prior stage of the proceedings.

But it must be observed that the phraseology of the statute is stated somewhat hypothetically, thus: "If final judgment has been rendered, an appeal may be taken." Yet, if that inference be accepted as correct, the right of appeal would be restricted to the defendant, as the statute says "an appeal may be taken on behalf of the accused"—making no mention of the State.

The appellate jurisdiction of this court is neither granted nor defined by statute, but is granted and defined by the Constitution; and it declares, in broad and comprehensive terms, that "the Supreme Court shall have appellate jurisdiction only, which jurisdiction shall extend to * * * criminal cases on questions of law alone, whenever the punishment of death or imprisonment at hard labor may be inflicted," etc. Const., Art. 81.

Construing the provisions of the statute and the Constitution together as laws *in pari materia*, we are to consider and determine whether an appeal can be prosecuted from a decree of a trial judge on a question of law arising in a criminal case antecedent to a judgment rendered upon an indictment.

It may be at once conceded—and it has been the uniform and consistent course of the decisions of this court for a great many years—that "if final judgment has been rendered upon an indictment," in a case punishable with death or imprisonment at hard labor, no appeal lies, on behalf of the accused, from any question of law, separate and apart from the *merits* of the case; but the language of the Constitution is in striking contrast with the statute, in that the appellate jurisdiction of this court is expressly extended "to criminal cases on questions of law alone," without any restriction in regard to final

judgment having been therein rendered, or with regard to the State or the accused being entitled to exercise that right.

It appears to have escaped the attention of counsel for the State that the statute with reference to appeals in criminal cases received a most decided change by a legislative enactment in 1878; which enactment provides, "that in all criminal cases in which appeals are allowable under the Constitution, the party desiring to appeal shall file his motion," etc. Section 1 of Act 30 of 1878.

The final section repeals all former laws upon the same subject matter.

The distinguishing characteristics of this act are: (1) it particularly specifies all criminal cases in which appeals are *allowable under the Constitution*, without regard to final judgment having been rendered; (2) it confers the right of appeal upon the *party* desiring to appeal, without restriction as to the State or the accused.

This statute seems to have escaped observation by the court in *State vs. Wilkins*, 37 An. 92, the leading case cited by counsel for the State, as will be shown by the following extracts which we have selected from the brief, viz.:

"On general principles an appeal from an interlocutory order or judgment in criminal matters does not lie. It seems necessary to continue to repeat the announcement that our Code of Practice does not assume to regulate criminal pleading, and has nothing whatever to do with it. *An appeal in criminal matters is regulated by the common law rules of practice, except when modified by our own statutes*, and the common law practice in criminal trials does not know such a proceeding as an appeal from an order (or judgment, if you will) overruling a plea which does not determine the case. The appeal is from the sentence or final judgment. *Our statute is*, that if final judgment has been rendered an appeal may be taken (Revised Statute, Sec. 1001), and it is but a recognition of the universal rule that where the ruling of the lower court does not dispose finally of the case, it can be reviewed only on appeal from the judgment that does dispose finally of it. Wharton Cr. Pr. and Pl., Secs. 775-777." (Our italics.)

It is evident that appeals in criminal cases have been recognized and controlled by the provisions of the organic law, ever since the adoption of the Constitution of 1845, Art. 63 of which is identical in terms with 81 of the present Constitution.

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Prior to 1843, appeals were not permitted in criminal cases; and during that year, the Legislature established the Court of Errors and Appeals, with appellate jurisdiction to review questions of law in criminal cases. But the Constitution of 1845 took its place. In *State vs. Adam*, 8 R. 571; *State vs. Charlot*, 8 R. 529; *State vs. Fount*, 2 An. 837, and *State vs. Brown*, 4 An. 505, these changes of the statute and constitutional law are treated of.

It is, therefore, clear that the provisions of the act for the Territorial Legislature of 1805, which adopted the precepts of the common law in reference to criminal proceedings, had nothing to do with appeals in criminal cases, *which were not permitted until nearly forty years thereafter*. *State vs. Seiley*, 41 An. 143.

We may consequently discard all common law authorities as having no application to the question before us.

That the authority of Act 30 of 1878 has been frequently recognized by this court since the date the Wilkins case was decided, as controlling the method of appeal, is attested by the following cases, amongst others, viz.: *State vs. Joseph*, 38 An. 33; *State vs. Cohn*, 38 An. 42; *State vs. Jenkins*, 38 An. 865; *State vs. Burns*, 38 An. 363; *State vs. Meddler*, 38 An. 390; *State vs. Furniss*, 38 An. 484; *State vs. Butler*, 35 An. 392; *State vs. Stephens*, 38 An. 928; *State vs. Estoup*, 39 An. 906; *State vs. Cloud*, 40 An. 618; *State vs. Lyon*, 41 An. 952; *State vs. Jolivette*, 43 An. 509; *State vs. Bevell*, 47 An. 48.

It will be ascertained to be a fact, that in repeated decisions of this court, both prior and subsequent to the passage of the act of 1878, the right of appeal has been recognized in favor of *both the State and the accused, on questions of law entirely independent of the final judgment on the merits relative to the guilt or innocence of the accused*; and that it has been repeatedly recognized to exist subsequent to judgment, as well as antecedent to judgment upon an indictment.

Section 1001 of the Revised Statutes is the exact reproduction of Sec. 26 of Act 121 of 1855, when the Constitution of 1852 was in force; and the appellate jurisdiction of the court in criminal cases was practically the same as it is under the present Constitution.

It continued to be the same under the Constitution of 1864, Art. 70; but in the Constitution of 1868, the language was so altered as to read: "whenever the punishment of death or imprisonment at

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hard labor * * * *is actually imposed.*” Art. 74. Yet, there was no corresponding change made in the statute, notwithstanding this important restriction upon the right of convicted persons to appeal, as well as that recognized to exist in the State.

Keeping in view the general rules thus formulated, a review of the jurisprudence prior and subsequent to the passage of the act of 1878 will materially aid us in solving the question propounded in the motion of the State to dismiss the defendant’s appeal.

I.

We may take as the starting point *State ex rel. Shelton vs. Judge*, 16 An. 159, which was decided under the Constitution of 1864. Relators had been arrested and brought before a justice of the peace for preliminary examination; and having waived examination, they objected to the examination being proceeded with. Thereupon the prosecutor applied for a writ of *mandamus*, to compel the justice to proceed with the examination of the witnesses, in order to perpetuate their testimony; and the writ having been made mandatory, the respondent demanded an order of appeal, and same was refused by the District Judge.

Relators applied to the Supreme Court for a writ of *mandamus* to compel the District Judge to grant them an appeal, and indisposing of that question the court, speaking through Chief Justice Merrick, said:

“The Constitution gives this court appellate jurisdiction of questions of law, whenever the offence is punishable at hard labor. Constitution, Art. 62. . . A question of law was then raised in the District Court in a case over which this court has appellate jurisdiction, and the question of law can not be raised by this court in any other manner than by a direct appeal from the decision on this *collateral matter* affecting the rights of the accused, *for the decision on this branch is final*”—and this court made the writ mandatory.

The provisions of the Constitutions of 1852 and 1864 are identical in this regard.

That *interlocutory* decrees, possessing the quality of *finality*, were, previous to that time, regarded as appealable, is intimated in several cases.

For instance, in *State vs. Tucker*, 7 An. 551, the court used this expression, viz.:

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"The record contains neither a final judgment nor interlocutory decree upon which we are authorized to act."

And in *State vs. Bouchon*, 20 An. 394—decided since—the court said:

"Yet there is not in the transcript of appeal either a final judgment signed by the judge, nor such *interlocutory judgment as will work irreparable injury*."

In *State vs. Cheevers*, 7 An. 40, the right of the State to appeal from an *interlocutory* decree of the trial judge, *in limine* and before the empaneling of the jury, sustaining the defendant's plea of *autrefois acquit*, was recognized; and thereon the case was examined and the judgment *affirmed*.

In *State vs. Hood*, 6 An. 179, the right of the State was recognized to appeal from an interlocutory judgment quashing an information.

Likewise in *State vs. Hendry*, 10 An. 207; *State vs. Ellis*, 12 An. 320—and other cases.

But the jurisprudence on this question is distinctly summarized in *State vs. Cason*, 20 An. 48—a case decided in 1878, the year in which the Constitution of that year was adopted—the appeal having been prosecuted by the State from an interlocutory judgment quashing an indictment.

The counsel for the accused filed a motion to dismiss, upon the ground that its right of appeal is limited to cases "where indictments have been quashed before trial, or held bad on demurrer, and can not be extended to cases in which trial has been had and verdict rendered."

But the court, speaking through Mr. Justice Ilsley, said:

"The Constitution, in giving appellate jurisdiction to this tribunal¹ upon questions of law in certain criminal cases, does not confine our power to an examination of questions arising *before or after verdict*, nor does it limit the right of appeal to either party.

"We can not therefore draw a distinction where the law makes none. *Ubi lex non distinguit, nec nos distinguere debemus*."

That decision gives a clear and cogent interpretation of the constitutional grant of appellate jurisdiction to this court in criminal cases, and there can be no misunderstanding of it.

But, when the terms of the Constitutions of 1845, 1852 and 1864 "may be inflicted," were so altered by those of the Constitution of 1868 as to read "*is actually imposed*," the jurisprudence received

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a corresponding change, and, in the following decisions of this court, which were rendered thereunder, the right was denied either State or accused to appeal in any case where a final judgment had not been rendered. State vs. Redding, 21 An. 188; State vs. Fournet, 22 An. 564; State vs. Gay, 22 An. 460; State vs. Welsh, 23 An. 142; State vs. Brown, 27 An. 286; State vs. Banks, 28 An. 92; State vs. Cullom, 28 An. 49.

It was during this period that the statutes were revised and Sec. 26 of Act. 121 of 1855 was crystallized into Revised Statutes, Sec. 1001.

But when, in 1879, the original terms employed in constitutions prior to that of 1868 were again incorporated into the organic law, the jurisprudence was readjusted so as to conform thereto; and this change is well stated in State *ex rel.* Gabriel vs. Judge, 33 An. 1227, same being a proceeding by *mandamus* to coerce the trial judge to grant the defendant an appeal from a judgment sentencing him to pay a fine of twenty-five dollars, under conviction of larceny.

In that case this court, recognizing the *right* of appeal to be controlled by the Constitution notwithstanding the act of 1878 had been in the meantime adopted, used the following language, viz.:

"Our present constitutional provision differs *toto cælo* from that of 1868, the latter limiting the right of appeal to those cases in which the punishment of death, or imprisonment at hard labor * * * is *actually imposed*," while the former extends "to those where, under the law governing them, they *may be inflicted*," etc.

The principle announced in that case was affirmed in State vs. Guillory, 42 An. 581. State vs. Williams, 37 An. 200; State vs. Taylor, 34 An. 978.

And in keeping with that principle we find, in State vs. Oliver, 38 An. 632, a striking application of it, and in the course of their opinion the court, speaking through MR. JUSTICE FENNER, said:

"The judgment appealed from sustained a motion in arrest of judgment on the ground of defect in the verdict, and remanded the prisoner to custody to await trial. The accused, contending that the legal effect of sustaining the motion in arrest, on the ground stated, was to terminate the case and entitle him to a discharge, and thus make a final judgment, prosecutes this appeal to correct an alleged error in remanding him to custody.

"He is entitled to have the question passed upon."

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In that case there had been a trial and verdict, but the trial judge had sustained the defendant's motion in arrest; and by this means the verdict was vacated, no sentence pronounced and the accused was remanded to *await trial*, and in the meanwhile to remain in custody.

Favoring the liberty of the citizen, this court entertained and passed upon his appeal.

Another striking illustration is found in *State vs. Williams*, 38 An. 960, wherein the right of the State to appeal from an interlocutory decree of the trial judge, granting the accused a new trial *ex proprio motu*, was sustained, and on the trial the order was annulled and set aside.

But in the very recent case of *State vs. Davis*, No. 12,084—which was decided on the 2d of March, 1896—we find the doctrine of the *Williams* case extended, and the aforesaid rule more fully exemplified.

In that case it appears that the defendant was indicted, tried and found guilty of embezzlement; and a new trial having been granted him upon *his own motion*, the State appealed.

Entertaining the appeal, this court, speaking through MR. JUSTICE BREAUX, said:

"Ordinarily no appeal lies in a criminal case from a motion granting a new trial. To reverse an order granting a new trial it must be manifest that an error of law was committed in granting a new trial.

"We do not think that in this case there was an abuse of discretion."

It is true, that after having examined and considered the question raised, and approved of the decision of the trial judge, the decree is "the appeal is therefore dismissed;" yet it is none the less a final judgment, that disposed of the only question at issue in the appeal.

In so deciding, this court followed, exactly, the precedent which was established in *State vs. Hornsby*, 8 Rob. 583, wherein the court entertained an appeal by the State from an interlocutory decree and decided it upon its merits, prior to final judgment on the indictment. This decree was rendered previous to the adoption of the Constitution of 1845, thus bringing the jurisprudence of the two eras together.

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II.

In repeated decisions, this court has affirmed the right of the State to prosecute an appeal from an interlocutory judgment of the trial judge quashing an indictment, under constitutions prior to that of 1868, of which the following will serve as illustrations, viz.: State vs. Hood, 6 An. 179; State vs. Hendry, 10 An. 207; State vs. Ellis, 12 An. 390; State vs. Ross, 14 An. 364; State vs. Clay, 12 An. 431.

Of those of this court under the Constitution of 1879 the following are illustrations, viz.: State vs. Humphries, 35 An. 966; State vs. Robinson, 37 An. 673; State vs. Laqué, 37 An. 854; State vs. Taylor, 34 An. 978; State vs. Brabson, 38 An. 144; State vs. Jefferson, 39 An. 331; State vs. Dubois, 39 An. 676.

The same rule has been applied to the right of the State to appeal from an interlocutory decree of the trial judge, sustaining a motion in arrest of judgment. State vs. Morgan, 35 An. 1139.

III.

It has been repeatedly held that a surety upon the appearance bond of an accused person who has not been tried upon an indictment, and is at large, has the right to avail himself of the appellate jurisdiction in criminal cases, without regard to the amount involved—the theory being that the character of the case in which the bond is taken attracts its jurisdiction to the bond. State vs. Cassidy, 7 An. 276; State vs. Williams, 37 An. 200; State vs. Burns, 38 An. 363; State vs. Balize, 38 An. 452; State vs. Hendricks, 40 An. 719; State vs. Ansley, 13 An. 298; State vs. Desforges, 5 Rob. 253; State vs. Toups, 44 An. 896.

IV.

An interlocutory decree may or may not dispose of the question that is before the court and is decided. If it does finally and irrevocably dispose of the question, it is as much a *final* decree of the court as a final judgment on the merits of the case.

The essential difference between an interlocutory and a final judgment is, that the former disposes of some collateral issue *outside* of the principal issue, while the latter disposes of the *merits* of the controversy. In criminal matters there is this further distinction, that the judge tries and decides the interlocutory question, and the

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jury decides the merits of the case with regard to the guilt or innocence of the accused.

A fair illustration of the principle is found in *State ex rel. Poché vs. Judge*, 42 An. 317, wherein the respondent having refused to grant relator a suspensive appeal from a decree overruling his plea of recusation, this court made a writ of *mandamus* peremptory, saying:

"An interlocutory judgment is one which does not decide on the merits. It is either ancillary to, or executory of, the final and complete adjudication of the cause.

* * * * *

"The matter at issue, on the plea of recusation, in no way relates to the persons of the litigants, or to any subject involved in the controversy between them. * * *

* * * "Whether the plea is well or ill founded is a question which can in no manner influence the judgment on the merits of the litigation, or on any subject growing out of the differences of the parties touching same."

A very similar question is raised here.

The defendant prays for the removal of the cause into a different parish for trial, because, in his opinion, he can not obtain a fair and impartial trial in the parish of Orleans; while in that case the object to be attained, and the effort was, to depose the judge on the ground that, by reason of his personal interest, he was disqualified to decide the merits of the case.

In each case, the question was one that could be tried but once; and having been decided, it would not recur again.

Indeed we might well adopt the language of the Chief Justice in that case when he says:

"There is but one question raised, and it concerns the qualification of the judge. A judgment on that issue can not be *interlocutory*, for such a judgment would imply a final judgment *in futuro*. As the question raised, when once decided, is no more to recur, it follows that the judgment on it would be and is final judgment on *that issue*."

V.

Applying the legal principles which are outlined above, to the motion of the State to dismiss the defendant's appeal, what is the conclusion at which this court must arrive?

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In treating of defendant's rights with reference to a change of venue, in *State vs. Daniel*, 31 An. 92, MR. JUSTICE DE BLANC, speaking for the court, said:

"It is manifest that such a motion is addressed, exclusively, to the judge, and that he alone can and must pass upon the sufficiency of the facts alleged and testified to;" and then adverting to the fact that no proof accompanied the bill of exceptions further observed, that had that been done "he would have presented a question of law resting on admitted facts, and that question we would have been bound to consider and decide.

"We believe, as urged by defendant's counsel, that in regard to such an application the discretion of the judge is not unlimited; that when prejudice does exist, when its existence is proven, the accused has an *absolute right to a change of venue, and that from an improper denial of that right he may appeal to this court.*"

It is provided in the bill of rights that "in all criminal prosecutions the accused shall enjoy the right to a speedy public trial by an impartial jury;" but this privilege is coupled with the proviso "that the accused in every instance shall be tried in the parish where the offence shall have been committed, *except in cases of change of venue.*" Constitution of 1879, Art. 7.

The framers of the organic law, *ex industria*, added the qualification to the proviso, "*except in cases of change of venue.*"

Not only is this so, but they deemed it a matter of sufficient importance to incorporate therein this further provision, viz.:

"The Legislature shall provide by law for a change of venue in civil and criminal cases." Article 158. Identically the same provision occurs in all previous constitutions. Constitution of 1845, Art. 115; Constitution of 1852, Art. 112; Constitution of 1864, Art. 115; Constitution of 1868, Art. 112.

In pursuance of these constitutional behests the general assembly have, at different sessions, enacted such statutes, and altered and amended same, until we have now only the provisions of the Revised Statutes, and the more recent act of 1876; and when construed together the rights and duties of the State and the accused, in this regard, are practically upon the same footing. Act 95 of 1876; Revised Statutes, Secs. 1022, 1023.

In the Revised Statutes the rules formulated under the distinct heading "Change of Venue," like that of "Recusation of the Judges

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in Criminal Cases" are altogether distinct from "Mode of Procedure."

Let us examine the character of the proceedings.

The statute requires that when any person indicted shall desire a change of venue, he shall apply therefor to the judge in a sworn application in which he shall state, substantially, "that by reason of prejudice existing in the public mind he can not obtain an impartial trial in the parish wherein the indictment is pending." R. S., Sec. 1022.

The direction of the statute is further, that such application "shall be accompanied with proof under oath, and the judge shall hear the parties and their witnesses;" and if, on such hearing and examination of the evidence adduced, he shall be of opinion that the party applying can not have a fair and impartial trial in the parish where the indictment is pending, the judge shall award the change of venue to the adjoining parish," etc. R. S., Sec. 1023.

The language of the act of 1876, amending Sec. 1021 of the Revised Statutes is, "wherever it shall be established by legal and sufficient evidence that a fair and impartial trial can not be had in the parish where the case is pending," the judge shall change the venue.

That the change of venue involves a question of jurisdiction as well as of constitutional right, there can be no question; and this fully appears from the opinion of this court in *Brouillette vs. Judge*, 45 An. 243, in which JUSTICE FENNER, speaking for the court, said:

"This statute so obviously contemplates a trial of the issue on evidence to be adduced, including the right to cross-examine witnesses for the State, and also, if so desired, to produce witnesses on their own behalf, that we are bound to conclude that the learned judge must have inadvertently overlooked its existence. Act 95 of 1876.

* * * * *

"Reference to Sec. 1023, Revised Statutes, regulating proceedings when the application for change of venue is made by defendants, shows the nature of the proceedings contemplated, clearly involving a contradictory hearing of the parties and their witnesses" (pp. 45 and 46).

The court, in the exercise of its supervisory jurisdiction, entertained a writ of prohibition at the instance of the indicted defendants, and annulled the respondent's order changing the venue of the

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prosecution against their wishes; and we made the writ peremptory upon the ground that the respondent exceeded the bounds of his jurisdiction in ordering a change of venue without such contradictory hearing and judgment based thereon.

The guarantee of the bill of rights is that "the accused shall have a speedy public trial by an impartial jury," and if, upon examination and trial of that question, it be ascertained that this guarantee can not be made effectual in the parish where the crime is alleged to have been committed, its further guarantee is that he shall have a change of venue.

In the Williams case (38 An. 960) we entertained an appeal by the State from an order of the judge, granting the defendant a new trial *ex proprio motu*, because it involved a question of the verdict operating the bar of once in jeopardy under Art. 5 of the Constitution; it is equally as clear, and just as free from doubt, that the defendant's appeal must be maintained, as, in his opinion, his constitutional guarantees of an impartial trial and change of venue have been denied.

For these reasons I dissent from the opinion expressed by the majority of the court.

No. 12,118.

THE STATE OF LOUISIANA VS. FLEMING ROBERTSON.

An indictment which, in one count, charges burglary and larceny is bad, and thereunder the accused can not be legally convicted of larceny.

A PPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

M. J. Cunningham, Attorney General, and *R. F. Broussard*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

A. & Chas. Fontelieu for Defendant, Appellant.

Submitted on briefs May 9, 1896.

Opinion handed down May 18, 1896.

State vs. Robertson.

The opinion of the court was delivered by

WATKINS, J. The defendant was indicted for the perpetration of the crime of burglary and larceny, committed in a dwelling house. and having been convicted of petit larceny and sentenced to imprisonment at hard labor in the State Penitentiary for a period of eighteen months, he prosecutes this appeal, relying upon a single bill of exception taken to the charge of the trial judge.

Among other things, the judge stated in his charge to the jury that they could find the three following verdicts, viz.: (1) Guilty as charged; (2) Guilty of larceny; (3) Not guilty; and the defendant, by counsel, excepted that under the indictment he could not be convicted of larceny, and his charge was erroneous.

There is but one count in the indictment, and it charges that the defendant did, in the night-time, with force and arms, a certain dwelling house feloniously and burglariously break and enter, with the intent to steal the goods and chattels of one Rogers Wadden, then and there situated; and that he did take, steal and carry away the goods and chattels described as being situated therein.

The statute declares that "whoever, with intent to kill, rob, steal, etc., shall, in the night-time, break and enter a dwelling house, on conviction shall be imprisoned at hard labor not exceeding fourteen years." Revised Statutes, Sec. 851.

Other sections of the Statutes are quite similar; but neither of them denounces the crime of larceny, or makes any provision for its punishment; this is covered by a different section altogether. Revised Statutes, Sec. 812.

Neither are the two crimes of the same generic class.

In State vs. Alfred Ford, 30 An. 311, the question here presented was examined and decided in favor of the defendant, the court saying:

"The offence of burglary is quite distinct from that of larceny. They belong to different families of crime, and it would be an enlargement of the rule, not warranted by authority or precedent, to hold good a conviction for one of them upon an indictment for the other."

In that case, as in this, defendant was indicted for burglary and larceny in one count.

We are of opinion that the defendant's bill of exceptions was well taken, and that the verdict and sentence must be set aside.

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It is therefore ordered and decreed that the verdict of the jury, and the sentence thereon pronounced, be annulled and set aside; and it is further ordered and decreed that the accused be set at liberty and his bond canceled.

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No. 12,119.

STATE OF LOUISIANA VS. FLEMING ROBERTSON.

An accused can be tried for an offence and sentenced, if found guilty, notwithstanding he has been convicted of another offence and is awaiting sentence. Under an indictment charging on one count burglary and larceny, it is error for the trial judge to instruct the jury that they can find the accused guilty of larceny.

A PPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

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M. J. Cunningham, Attorney General, *R. F. Broussard*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

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A. & Charles Fontelieu for Defendant, Appellant.

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Submitted on briefs May 9, 1896.

Opinion handed down May 18, 1896.

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The opinion of the court was delivered by

MCENERY, J. The defendant was indicted in one count for burglary and petty larceny, and was convicted of petty larceny.

He objected to going to trial on the ground that he had been convicted in another case of an offence, and could not be tried and sentenced for any other, until the expiration of his sentence under the first conviction.

There is no reason why his trial for the second offence should be postponed until the expiration of the sentence under the first conviction. Public policy alone protests against such a course. Why should the defendant be permitted, because he has committed another crime, to postpone the trial? Why should the commission of the second offence give him a privilege which its non-commission would not have conferred? Death of witnesses, their absence, the

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weakening of their memories as to the facts, and all the attendant advantages of a continuance would be in his favor, much to the detriment of public interest, which requires a speedy trial of all offenders against the law. There is no sound reason why the defendant can not be tried and sentenced, the punishment to begin at the expiration of the first sentence imposed.

The judge charged the jury that under the indictment they could bring in a verdict of guilty of petty larceny. To this charge the defendant excepted.

The trial judge was in error for the reasons assigned in case of the State vs. same defendant, *ante*, p. 1024.

It is therefore ordered, adjudged and decreed that the verdict and sentence be set aside, and it is now ordered that this case be remanded to be proceeded with in due course of law and in accordance with the views herein expressed.

No. 12,131.

STATE EX REL. OTTO KNOOP VS. THE JUDGE OF THE SECOND CITY COURT OF THE CITY OF NEW ORLEANS.

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52 184

Relator having been sued in the Second City Court of the city of New Orleans for the sum of twenty-five dollars, as the amount of a call of 10 per cent. upon five shares of the capital stock of a corporation, and having answered that he was not the holder of said shares of stock, and consequently did not owe the amount demanded of him, and upon that ground excepted to the original jurisdiction of the respondent's court: *Held*, that if relator shall make good this defence, it would be a good reason why judgment on the merits should go in his favor, but not that the jurisdiction of respondent should be defeated.

ON APPLICATION for Writs of *Certiorari* and Prohibition.

Frank McGloin for Relator.

Percy Roberts and *J. Zach* appearing for Respondents:

When the jurisdiction of a court depends upon the amount in controversy, it is to be determined by the amount involved in the particular case, and not by any contingent loss which may be sustained by either one of the parties through the probative effect of the judgment, however certain it may be that such loss

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will occur. *New England Mortgage Co. vs. Gay* 145, U. S. 128; *Clay Center vs. Farmers' Loan & Trust Company*, *Ibid.* 224; *Elgin vs. Marshall*, 106 U. S. 578; *State ex rel. Sweeney vs. Judge*, 40 An. 1; *Ibid.*, 39 An. 619; *State ex rel. Beauvais vs. Judges*, 48 An. 672.

Submitted on briefs April 6, 1896.

Opinion handed down May 18, 1896.

The opinion of the court was delivered by

WATKINS, J. The representations of the relator are that the Interstate Fire Association instituted suit against him in the respondent's court for an instalment of ten per cent. upon certain shares of stock of said corporation, amounting to twenty-five dollars. That he appeared and answered that he was not a stockholder in said corporation, and was, consequently, not indebted to the plaintiff in the amount demanded of him. That, subsequently, he excepted to the jurisdiction of the respondent's court to hear and determine the issue joined for the reason that the alleged call of twenty-five dollars represents stock of said corporation of the par value of two hundred and fifty dollars, an amount in excess of the jurisdiction of his court; and that the demand of the corporation, as well as the answer of the relator, necessarily involves the entire contract. That unless restrained by our writ of prohibition respondent will proceed to hear and determine said suit to his great and irreparable injury.

The return of the respondent admits the state of facts to be as related above, but he insists that his court has jurisdiction, and is perfectly competent to decide the cause.

The jurisdiction involved is original and not appellate; and consequently we are not to be exclusively guided by the decisions of this court interpreting its appellate jurisdiction.

The suit in the respondent's court is upon a simple moneyed demand for the sum of twenty-five dollars; and the answer is that relator does not owe the debt because he is not the owner of the shares of stock upon which the call is predicated. Having created this issue as a matter of defence, relator as defendant excepts to the jurisdiction of respondent's court; and failing to secure a favorable

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ruling upon his exception, he has applied to this court for relief by prohibition.

The original record is before us, and fully confirms the statements we have related; and amongst other things which has attracted our attention is a certificate of stock in the plaintiff company which was apparently signed by the relator.

In our opinion the defence, if made good by the relator, would be good cause for the respondent to decide the case in his favor, rejecting the company's demand; but that the exception founded upon relator's answer can not oust the jurisdiction of the respondent's court.

For these reasons the preliminary writs are set aside and relief refused the relator at his cost.

No. 12,152.

STATE OF LOUISIANA EX RELATIONE LOUIS H. HUSON, SHERIFF AND
TAX COLLECTOR VS. BANK OF MANSFIELD.

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Banking institutions, incorporated under the banking laws of the State, with a capital less than the *minimum*, expressed in paragraph thirteen of the revenue license law, can not be required to pay license.

The legislative intention to levy a license must be distinctly shown; it can not be extended beyond the clear import of the words of the statute.

If it were not the intention of the General Assembly to exclude them from the terms of the law, the omission can not be supplied by construction.

A PPEAL from the Ninth Judicial District Court for the parish of
De Soto. *Hall, J.*

J. B. Lee, District Attorney, for Plaintiff, Appellant.

Elam & Egan for Defendant, Appellee.

Submitted on briefs May 20, 1896.

Opinion handed down June 1, 1896.

The opinion of the court was delivered by

BREAUX, J. The relator is the sheriff and *ex-officio* tax collector of the parish of DeSoto. He alleges that the defendant bank is in-

State ex rel. Sheriff and Tax Collector vs. Bank.

debted to the State of Louisiana and to the parish of DeSoto for license tax for the years 1895 and 1896.

The defence to this claim is, that the Legislature has not imposed any license tax on incorporated banks having a capital of less than fifty thousand dollars.

It is admitted that the capital stock of the defendant company is fifteen thousand dollars, and that it has no surplus.

The judgment of the District Court is against the plaintiff.

The plaintiff appeals.

The authority delegated to the Legislature to impose a license tax is contained in Art. 206 of the Constitution.

In accordance with the authority conferred, the Legislature enacted the statute No. 150 of 1890. The article of the Constitution did not ordain that all persons or corporations pursuing business or calling should pay a license tax, but left it to the General Assembly to levy a license tax. The power must be exerted by legislation in order that payment may be required.

The charge must be imposed in clear and unambiguous terms. It can not be made to rest upon mere inference or implication.

The provisions of the existing law relating to the license tax, negative the proposition that it was the legislative intention to impose such a tax upon incorporated banks having no more capital than had the defendant.

The lowest limit of the license is seventy-five dollars, as expressed in the thirteenth class of the existing license law.

The lowest amount subject to the license tax is fifty thousand dollars. Under a law authorizing the collection of a tax from a banking institution having that capital or more, we find no warrant to collect a tax from a banking institution having less than that amount of capital. A minimum limit, as to licenses, has been fixed which we must respect. There is no limit to the amount in the ascending grades, commencing with the thirteenth class of the act in question. The first-class provides for a license when "the declared or nominal capital is five million dollars or more, while in the thirteenth class the amount is expressly limited to fifty thousand dollars, thereby rendering it impossible to collect a license from a banking institution the capital of which is less than the amount we have before stated as being the *minimum*. The classes are distinct as set forth in the statute and must be enforced as enacted.

Henderson et als. vs. Insurance Co. et al.

It would be assuming a right if we were to change the limits expressed. If it were the obvious intention and meaning of the Legislature to exempt these institutions with capital less than the amount before stated, viewed as a question of power, the legislative will must control. A license law can not be extended by construction.

If it were not the intention, but a *casus omissus*, we would be assuming a right to supply what we might conceive to be its defects. Omissions can not be supplied by the courts.

No license can be exacted not imposed by words of the statute. *Barnard, Sheriff and Tax Collector, vs. Gall & Pharr, 43 An. 959.*

The power delegated to the General Assembly to levy a license tax is discretionary and not mandatory. *City of New Orleans vs. J. Mule, 38 An. 826, 828.*

All arguments based on intention must be addressed to the Legislature.

The one alternative with us under the present regulations for license taxation is to affirm the judgment.

The judgment is affirmed.

No. 12,101.

W. H. HENDERSON ET ALS. VS. SUN MUTUAL INSURANCE COMPANY
ET AL.

Damages having been sustained by plaintiffs' building by the falling of an adjacent wall, occasioned by fire, the insurance company availed itself of an option in its contract to repair the injury. In the meanwhile—the necessary repairs being in course of completion—an accident is caused by the faultiness of the materials used and the carelessness and negligence of the workmen in the defendants' employ, whereby the building is collapsed and rendered untenable, and the tenant is rendered unable to continue his occupancy: *Held*, that plaintiffs have stated a cause of action upon alleging these facts for the recovery of damages *ex delicto*, from defendants.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Fenner, Henderson & Fenner, for Plaintiffs, Appellants.

*Denégre, Blair & Denégre and Leovy & Leovy, Carroll & Carroll for
Defendants, Appellees.*

Henderson et als. vs. Insurance Co. et al.

Argued and submitted May 22, 1896.

Opinion handed down June 1, 1896.

The opinion of the Court was delivered by

WATKINS, J. This is an action for the recovery of damages *ex delicto*, the charge, substantially, being that plaintiffs' property having been insured by the defendants, a loss by fire having occurred, and they, having exercised an option of the contract to repair the fire damage done to the building, did the work so faultily, that the structure collapsed and become untenable and hence they have been deprived of its use and enjoyment.

The defendants tendered a plea of no cause of action, and it having been sustained and the suit dismissed, the plaintiffs have prosecuted this appeal. The proposition for the consideration of this court is simply whether the truth of plaintiffs' averments being admitted, can a valid and exigible judgment be predicated upon the petition. The petition is elaborate and appears to have been drawn with care and precision.

It alleges the contract of insurance and a loss occasioned by a fire in the adjoining building whereby plaintiffs' building was seriously injured during the tenure of the contract. That the defendants exercised the option of the contract of insurance and undertook to repair, rebuild or replace the property lost or damaged within a reasonable time. That the injury plaintiffs' building sustained by the fire was not of a character or of that extent to make it untenable, but the defendants employees and workmen performed their work so carelessly and unskillfully that the building collapsed and became untenable on that account, requiring its entire reconstruction.

That at the time of this work of repair the building was under lease to a responsible tenant at a monthly rental of four hundred and thirty-seven dollars and fifty cents, which was revoked by the demolition of the building, the tenant on that account having declined to pay his rent.

Upon the foregoing averments the prayer of the petition is for judgment against defendants *in solido* for the sum of five thousand and seven dollars and sixty cents in money as the resulting damages sustained.

This is in no sense a suit for damages *ex contractu* or *ex quasi contractu*; but a suit for damages *ex delicto*. The defendants are not sued for rent, but the contract of rent is pointed out as clearly indicating the measure of the plaintiffs' damages. This is clearly shown by the averment of the petition, to the effect that they notified the defendants "that if the lease was annulled they would be held liable to petitioners for the loss of rent thereby as damages resulting through their fault."

Surely that is not an appropriate averment in a suit upon a contract. True it is, that there had subsisted and was still subsisting between the parties a contract of fire insurance, but the defendants had elected to repair the fire damage and place the building in the same good condition it was before the fire. That work had been undertaken and was in progress. There was no objection or demurrer made to that election by the defendants. In that manner the relative rights of the parties had been adjusted. But the building being tenantable and still occupied by the plaintiffs' lessee, an accident occurred, the building collapsed, and the tenant abandoned the leased premises, all on account of the fault and negligence of the defendant's workmen and employees, and the faultiness of their workmanship and material. This suit is for the purpose of recouping the loss sustained through this negligence and fault.

Admitting the foregoing statement of facts, substantially, the judge *à quo* makes the assignment of his reasons for his judgment, viz.:

"For the purpose of this suit, the contract of insurance is virtually out of the case, and the plaintiffs are in the same position as though they were suing for damages resulting from the careless and unskillful execution, by the defendants, of a contract for the repair of the building in question.

* * * * *

"The exception, in my opinion, is well taken. The loss sustained by plaintiffs by reason of the cancellation of their contract of lease with Meyer & Bro. was not a loss which could be said to have been within the contemplation of the parties to the contract under which the building was being repaired."

In our opinion, the learned judge of the District Court has misapprehended, altogether, the scope and purpose of plaintiff's suit. It has nothing whatever to do with the contractual relations of the

Lumber and Shingle Co. vs. Hart.

parties growing out of the contract of insurance which was resolved into a building contract. The defendants will carry that engagement to its completion according to its tenor. If they should not, the plaintiffs would have their action for a specific performance, or commensurate damages.

But, in the meanwhile—the necessary repairs being in course of completion—an accident is caused by the faultiness of the materials which are being used, and the carelessness and negligence of the workmen employed, whereby the structure is collapsed, the building rendered untenable, and the lessees unable to continue its occupancy for the purposes of his lease.

In this situation plaintiffs institute suit for the recovery of the damages they have suffered by the loss of a tenant through the fault and negligence of defendant's employees.

The theory of their case is, that defendants could have carried the repairs to completion, fulfilled their contract to their satisfaction, without disturbing their tenant in the least, provided their employees had exercised due care, and used proper materials; but having failed to do so, they are bound to reimburse their loss.

With due regard to the appreciation which our learned brother entertained of plaintiffs' petition, we think it states a cause of action.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is now ordered and decreed that the cause be remanded to the court *a qua* with directions to the court *a qua* to reinstate the cause, and take further proceedings according to law. And it is further ordered and decreed that the costs of appeal be taxed against the defendants and appellees, and that all other cost await the final decree of the lower court.

No. 12,157.

THE WHITE CASTLE LUMBER AND SHINGLE COMPANY VS. ROMANTA
T. HART.

The intervenor is entitled to the time necessary to cite the parties and put the intervention at issue; held that judgment twelve days after the filing of the intervention, confirming the principal demand, and dismissing the intervention not then at issue, denies the intervenors rights. C. P., Art. 389, *et seq.*; 16 La. 251; 12 An. 460; 8 An. 381

Lumber and Shingle Co. vs. Hart.

The amount of the principal demand, is the test of the right of appeal of the intervenor, 8 La. 167; 2 An. 189; 6 An. 112.

A PPEAL from the Fourteenth Judicial District Court for the Parish of Iberville, *Talbot, J.*

McCulloh & Gahan and *Louis Lozano* for Plaintiff, Appellee.

Edward N. Pugh and *Paul Leche* for Intervenors, Appellants.

Submitted on briefs May 20, 1896.

Opinion handed down June 1, 1896.

The opinion of the court was delivered by

MILLER, J. There is a motion to dismiss the appeal of the intervenors in this cause, on the ground that the amount in controversy is less than two thousand dollars.

The plaintiffs' suit was for a debt exceeding two thousand dollars, enforced by writs of attachment under which the defendants' property was seized. The intervenors, creditors for the amounts separately and in aggregate less than two thousand dollars, in their petition averred there was no debt of defendant to plaintiffs, that the suit and attachments were devices by which defendant's property was to be transferred to the prejudice of his creditors and the relief sought was the annulling of plaintiffs' proceedings and attachment against defendant, and that he be ordered to surrender his property to his creditors.

The plaintiffs' debt, judgment and attachment are thus controverted by the intervenor and constitute the matter in controversy. We conceive it to be settled that the amount claimed by plaintiff in the suit and not that claimed by the intervenors is the test of our jurisdiction of this appeal. *Hart vs. Lodwick*, 8 La. 167; *Colt vs. O'Gallagher*, 2 An. 189.

The motion to dismiss is therefore denied.

The intervention was filed and the usual order made that defendant be cited. Within twelve days from the date of this order the plaintiff confirmed its default against defendant and the judgment dismissed the intervention. From that judgment the intervenors appeal,

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and contend the judgment practically denied the right accorded them by law. While it is true the intervenor can not retard the principal suit, it is equally true the intervenor must be allowed the time to cite the parties and put the intervention at issue. In this case there was no answer by defendant, and when the plaintiffs took their judgment, a default was due on the intervention, but if that default had been taken the very day the delay expired the demand of the intervenors was not ripe for confirmation. The judgment thus was rendered before the intervenors, with all possible promptitude, could have tried or confirmed default on their demand. It would be idle to accord the creditor the right to intervene if the plaintiff could close the controversy, for plaintiffs' judgment must dispose of the intervention before the intervenor can try his case. See C. P. Arts. 389 *et seq.*, 16 La. 264, Ardry's wife vs. Ardry; Yale vs. Hooper, 12 An. 460.

It is therefore ordered that the judgment of the lower court be avoided and reversed, the intervention reinstated and proceeded with according to law, and that appellees pay costs.

No. 11,998.

SUCCESSION OF R. H. ALLEN.

The executor who is a legatee has the right to appeal from a judgment against him in his official capacity. He has the right also to appeal from a judgment ordering a distribution of the funds in a manner different from that exhibited by his account. Representing all parties he has the right to appeal for the common benefit of all, as it is his duty to see that the funds are distributed among those whom the testator intended should be beneficiaries.

The intent of the testator is to be determined from the whole will. Every word shall have effect if it can be done without defeating the general purpose of the will which is to be carried into effect in every reasonable method.

When the reading of a whole will, will produce a conviction that the testator must necessarily have intended an interest to be given, which is not bequeathed by express or formal words, the court will supply the defect by implication and so mould the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion, that he has on the whole sufficiently declared. Punctuation must give way whenever it interferes with the proper and reasonable construction of a will. The testator made the following disposition: "The other half of Blenzl and a claim I hold against the government of the United States for army supplies, I think is about one hundred thousand dollars. These two amounts, or halves, I intend to give to the families of my brother Thomas H. Allen's four children * * * And to the five children of my sister Cynthia A. Smith * * *. *Held*, that the testator intended the children of his sister to participate in the legacy, and that he grouped the legatees into families, and they took *per stirpes*.

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Succession of Allen.

The general description of property or the classes or kind in a will, preceded or followed by words of narrower import, if the bequest is not residuary, will be confined to species of property of some kind with those previously described. The adoption of the more comprehensive meaning would have the effect of rendering the superadded expression nugatory; and make the testator employ additional language without any additional meaning.

In order to give effect to the general as against the restricted words in the will, there must be some expression in the will to show that the testator intended to pass the residue of his estate.

The will speaks from the death of the testator, unless the language used, such as the word *now*, or a verb in the present tense which requires it to be taken at the time it is used. The testator speaking by and through his will, instructed his executors to sell his Rienzi plantation and gave them a designated time in which to act, and directed that until the sale, the wife should receive the proceeds of the plantation, if worked, until sold. *Held*, that the wife was entitled to the net proceeds as long as the plantation remained in the hands of the executor, and the proceeds of the crop growing on the place at the time of his death, passed to the wife.

Coal on the plantation for the service of the sugar house is immovable by destination. If the coal and other immovable things by destination are consumed in the cultivation of the place and the manufacture of the crop for market, the legal heirs have no claims for reimbursement.

The legacy of an English education to two small boys, at the expense of the estate, is not void for uncertainty.

A sum of money bequeathed to neices, with the expression, "and have no interest in any other claim," and the remainder of the estate is the only fund upon which they could assert any claim, they can not participate in the *residuum* of the estate.

A PPEAL from the Eighteenth Judicial District Court for the Parish of Lafourche. *Caillouet, J.*

Fenner, Henderson & Fenner, and Thomas A. Badeaux for R. H. Allen, Jr., Harry Allen, Mrs. J. C. Allen, Mrs. J. C. Latham and Thomas H. Allen, Appellants.

Beattie & Beattie for Bettie Allen, and Wm. F. Collins, Executors, Appellants.

Clay Knobboch & Son for Ogden Smith, Co-executor, Appellee.

E. D. LeBreton and L. DePoortor for Mrs. Jennie Boyle, Mrs. Bettie DeBerny and Mrs. Allen B. Baker, Legatees, Appellees.

Succession of Allen.

Henry Chiapella for the Turner heirs, Opponents, Appellees.

C. H. Osterberger and *L. F. Suthon* for Gaston Smith and others
Opponents, Appellees.

Argued and submitted February 14, 1896.

Opinion handed down March 9, 1896.

Rehearing refused June 1, 1896.

The opinion of the court was delivered by

MCENERY, J. The deceased left the following will: "I give to my Dear wife Bettie Allen all my corporal movables such as furnature, bedding Linin silver plate, China ware &c. all my stock of cattle all my horses and Carriages she is to occupy The Homestead without reservation or distinction till the plantation is disposed of I authorize her to take immediate possession of the same for her own use without Inventory or Controle of any kind. My debts are small I have no children nor forced heirs. I wish the tribunals of La to have nothing to do with my Estate unless somting arises that that can not be avoided I do this for econlmy.

"In addition to the above gifts I give to my dier wife Bettie Allen four thousand Dollars worth of City of New Orleans Bonds four per cent. interest Bearing Bonds, with Coupunds. I give her also two thousand Three hundred and fifty Pounds Sterling in the hands of Bearing Bro &c *limited* more or less (see their ac. currents in chat).

"This will be ovr fourteen thousand Dollars for a house I gave her at our marriage not recorded but good. I give to my Wife Bettie Allen one-half of my Rienzi Plantation and one-half of all tools mules &c the names of my Executors &c will be named hereafter. My Executors shall have from one to five years to Sell and clos up the estate as I fear property will be verry low and dull. They can sell part cash part on time 8 per cent. Interest with Vendors lean I will that my wife do have one-half of everyr thing belongin to Rienzi, Except the Claim due me by the U. States that and other Property I will speak of further on.

"I apppoint as my Executors Ogden Smith and W F Collins resid-ing on Rienzi plantation I also apppoint Mrs Bettie Allen Executrix. I give them ful power to sell Rienzi plantation When Ever they find

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a good offer all the property there belonging. When it is sold half of all the proceed Cash Notes &c is to belong to my wife Bettie Allen The other half will be spoken of hereafter As I fear property will be very low I give my Executors five years to work for a good price in the Meantime That they are waiting to sell, the place can be rented or worked so as to pay all Taxes and other Charges, any over that go to Mrs Bettie Allen's credit. The other half of Rienzi and a claim I hold against the Government of the United States for army supplies I think is about one hundred thousand dollars These two amounts or halves I intend to give to the families of my Brother Thomas H. Allen's four children R. H. Allen Jr for his family's use Thomas H Allen Jr for his wife and children Harry Allen for his wife and children Mrs. Mary Louis wife of J. C. Leatham of New York city.

"And to the five children of my Sister Cynthia A. Smith Gaston Smith, Fred W. Smith Jr. Mrs. Nellie Houchens, Ogden Smith & Thomas A. Smith. My three neices Mrs. Jennie Boyle, Mrs. Bettie De Berny, Mrs. Ellen B. Baker have Received Each five hundred Dollars I will that they receive five hundred dollars more in Cash and have no interest in any other Claim. my Brothers firm in Memphis Tenn owes me \$17,369 Dollars Seventeen thousand three hundred and Sixty nine dollars loaned them he having surrendered all his Estate to his Credited Which he thinks will pay all he owes. I therefore Give this sum \$17,369 to The wife of of my Brother for her self and all the dividends on that amount.

"To Mrs Sallie Cragin I give five hundred dollars to Walter Collins I give two hundred dollars. To my faithful servants Lizzie Harrison and Mat Dickerson I give one hundred and fifty dollars Each.

"To my sister Myra Turner's two sons John B and William Turner I give John B His note for three hundred dollars deducting Interest. to Will I have given as much as I intend in Cash.

"I hold Fred W. Smith note for five hundred dollars this note Can be given him without counting Interest as part of his share heretofore given him. My gold Watch and chain I give to my namsake R. H. Allen, son of Thomas H. Allen Jr of Memphis Tenn to be given him when of age.

"Codicil No. 1 I will that Mrs Cragin's two small boys shall be given an English Education at Expense of the Estate I will that my

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Executors shal not give bond as I think them honest men I prefer they pay off the cash donations as soon as possible."

A motion has been filed by the executor, Ogden Smith, who is one of the heirs, to dismiss the appeal from the judgment adverse to the Allen heirs, taken by them.

In the Succession of Ames, 88 An. 1818, this court had occasion to notice the distinction between the functions of an administrator and an executor, giving to the latter, when a creditor, the right of appeal from a judgment adverse to his interest. The reasons assigned for the judgment in that case are conclusive. The executor is the mandatory of the deceased, and a mediator between the parties having an interest in the succession. He represents creditors and heirs, and it is his duty to see that the will is executed according to the wishes and desires of the testator. He is interested in the proper distribution of the funds, and it is sacred duty to see that they are distributed among those whom the testator intended should be beneficiaries. Representing all parties, he has an undoubted right to appeal for the common benefit of all the parties.

The Succession of Nicholson, 5 An. 359, is directly applicable to this case. In that case the testator left a sum of money for "the support of asylums in the faith of the Protestant religion especially devoted to the care of aged persons." There was no institution in the city of New Orleans where the bequest was to be expended, answering to the description in the testament. The St. Anna Asylum devoted to the relief of destitute and helpless children claimed the legacy, as the only institution in the city of New Orleans coming near the terms and conditions of the will. The judgment of the lower court was in favor of the St. Anna Asylum. On appeal by the executor the judgment was reversed. In this case the court said: "The will is his (executor's) mandate. He has no power and is subject to no duty except within its terms and conditions." The executor, therefore, has the right to appeal from a judgment interpreting the will, which he thinks is contrary to the intentions of the testator. In oppositions to the distributions of a fund there are as many adjudications—separate judgments as there are oppositions and the party aggrieved must appeal for relief, and unless he does so this court will not amend the judgment as between the appellees made so by the operation of the appeal, except so far as the judgment between immediate parties to the appeal may affect indirectly

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their interests. By the appeal of the executor from a judgment adverse to his professed distribution of funds as he interprets the will, all the beneficiaries, legatees and heirs are necessarily immediate appellees.

The motion to dismiss is therefore denied.

The executors could not agree on an interpretation of the will, and there were controversies between the legatees and heirs among themselves and with the executors.

Two of the executors, Mrs. Allen and Collins, filed a provisional account, proposing to settle the bulk of the estate and distribute the funds on hand, and await a further realizing of assets and to make a future and final distribution. The executor Smith filed a final account.

Oppositions were filed by the executors to the accounts of each, and there were numerous other oppositions by the heirs.

Collins and Mrs. Allen, executors, propose to turn over to the latter, the *residuum* of the estate. The heirs, including the executor, Ogden Smith, oppose the account, on the ground that as to the *residuum* the testator died intestate, and it should be distributed among those to whom the law gives it. Mrs. Allen, claiming the residue, opposed the account. The division of the plantation is contested between the children of Thomas H. Allen, and the children of Mrs. Smith, brother and sister of the deceased. There were four Allen and five Smith heirs. Hence the contention of the former, that one-half of the plantation absolutely should go to them, as they deny the bequest to the Smith heirs; and that if they are entitled to a part of the plantation as legal heirs, that the half of the plantation should be divided *per stirpes* and not *per capita*.

The executors concur that each of said heirs should receive one-ninth of the half of the plantation. Collins and Mrs. Allen, executors, propose to pay Mrs. Cragin for her boys, a sum sufficient to educate them. Smith, the executor, and one of the heirs, opposes this item in the will, because of its uncertainty. The executor, Smith, differs with the other executors as to the disposition of the crop of 1894, the former contending that the proceeds should be turned over to the heirs as a part of the estate undisposed of by the testator, and the three nieces named in the will claim a part of the *residuum* as heirs. Their quality as legal heirs is denied by the executors. Two of them agree that they are entitled each to five

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hundred dollars; the others that this sum must be distributed among them.

The Turner heirs oppose the claim of the three neices, and, as a consequence of the rejection of their claim, they allege they are entitled to interest, as part of the *residuum*, to the extent of one undivided third jointly. They oppose the classification of the old iron, coal, corn and hay, as immovable by destination, and there are many other items in the account of the executor Smith objected to by them.

The District Judge consolidated the two accounts and the oppositions filed, and treated them as one proceeding.

The judgment of the District Court was that the bequest to Mistress Bettie Allen of all testator's corporal movables did not entitle her to the money found in his house at his death, nor to the money in bank, nor to the sugar on plantation at testator's death, after the payment of the special legacies and debts of the estate, and that these amounts formed an unwilling portion of the estate to be distributed to the heirs-at-law of the deceased, leaving out the heirs that were disinherited, the court deciding that the testator's three nieces were disinherited, with the exception of a legacy of five hundred dollars left to each of them.

The lower court further sustained the legacy to give Mrs. Cragin's two small boys an English education, fixing the amount to be paid her; and that the Rienzi plantation was devised one-half to Mistress Bettie Allen, and the other half was to be divided into ninths, one-ninth going to each of the Allen heirs, and to each of the Smith heirs.

It further holds that the crop of sugar and molasses made on the Rienzi plantation in the year 1894, which Ogden Smith proposed to account for (though unsold), could not be accounted for till sold, but that, as the question of its distribution was raised, it should be divided among the devisees of the plantation in the proportion they took said plantation, and not to Mistress Bettie Allen, as she contended for in her opposition.

The lower court upheld the payment of attorney's fees, as proposed by Ogden Smith, executor.

And, finally, it decided that the account of Ogden Smith, executor, was not a final account, but that the final account must be recast, and that the question of the distribution of the bounty money due

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by the United States Government for the sugar made during the year 1894, should be left open for decision when the money was collected and proposed to be distributed by the executors.

From this judgment the executors, W. F. Collins and Mrs. Bettie Allen, the Allen heirs and Mrs. Bettie Allen, personally obtained orders of appeal.

The first question presented is, is Mrs. Allen appointed residuary legatee under the will?

Where general expressions stand immediately associated with less comprehensive words, they have been sometimes restricted to articles *ejusdem generis*; the specific effects being considered as denoting the species of property which the larger term was intended to comprise. Jarman on Wills, p. 352, Vol. 2.

The circumstance of a specific or pecuniary legacy being given to the one legatee, or of the general bequest being followed by particular portions of the personal property to other persons has been considered to favor the supposition that such bequest was not to comprise the general residue. *Id.*, p. 354.

And it has been often, we may say invariably held, that a general description of property, or description of the class or kind, preceded or followed by words of narrower import, if the bequest is not residuary, will be confined to species of property of same kind with those previously described. The adoption of the more comprehensive meaning would have the effect of rendering the superadded expression nugatory, and make the testator employ additional language, without any additional meaning. Jarman on Wills, 356; 15 Ind. 326; 2 Bl. Comm. 384; Lartigue *et al.* vs. Duhamel's Executor, 4 N. S. 665.

The confecton of the will shows that the testator was ignorant of grammar and orthography, and the most elementary rules of composition. His uncouth language, inapt and confused expressions must be overlooked and construed into logical conclusions and consistent expressions in the effort to ascertain his intention, which must govern, unless the thing to be done is opposed to some inflexible rule of law.

The rules for the interpretation of testaments are: (1) The technical import of words is not to prevail over the obvious intent of the testator; (2) when technical words are used by the testator, or words of art, they are to have their technical import,

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unless it is apparent that they were not intended to be used in that sense; (3) the intent of the testator is to be determined from the whole will; (4) every word shall have effect if it can be done without defeating the general purpose of the will, which is to be carried into effect in every reasonable method. C. C. 1712. Succession of Blakemore, 43 An. 850; State of Louisiana, etc. vs. Executors of McDonogh, 8 An. 171; Williams vs. Western Star Lodge, 38 An. 620; Succession of Bobb, 41 An. 250; City vs. Hardie, 43 An. 253; 16 Ind. 479; 11 Pick. 257-378; 13 Ind. 413; 2 Met. (Mass.) 191-194; 12 Johns 389; 8 Ind. 3, 306; 5 Mass. 500; 5 Denio, 646; 3 Pick. 362; 2 Md. 82; 1 Jarman Wills, 404-412.

In the will he gives to his wife all his corporeal movables, and follows this general disposition by a specific enumeration of the immovables, such as furniture, bedding, linen, silver plate, chinaware, etc. All of his stock of cattle, horses and carriages. It will be noticed that after the designation of furniture, etc., the sentence stops, and then in another sentence he disposes of a different species of corporeal movables. There is no ambiguity in this part of the will. No construction can be put upon the language than that the testator intended to limit the corporeal movables to those designated. The words reviewing the general description of the property seem to have been used advisedly by the testator. That he did not intend that his entire personal estate should pass by the general description of corporeal movables, is evident from his limiting its application in the words descriptive of particular species of property, and the further fact that large portions of his personal estate are devised to particular legatees. And again to the wife he gives other corporeal movables, such as one-half of all tools, mules, etc. He speaks of the legacy to his wife of one-half of the Rienzi plantation a second time, and uses the expression that she should have one-half of everything belonging to Rienzi, except a claim of one hundred thousand dollars due, as alleged by the Federal government, and the other property he says he will dispose of further on. He had disposed of the Rienzi plantation—all the immovable property he possessed. His other property then was movable, a part of which he had given to his wife, and the other property he proposed to dispose of thereafter. The other property could only have been that which he had not disposed of. It may have been his intention, as is usual in wills, to make his wife the residuary legatee at the

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closing of his will. But unfortunately for her he failed to do so, and as to this part of his estate he died intestate. The presumption is that the testator intends to dispose of his entire estate and not to die partially intestate. Sometimes slight expressions, if they can be construed as his intention to do so, are seized upon as the means of carrying out the supposed intention of the testator.

We have carefully studied the expressions in the will to ascertain if anything could be gleaned by which the testator's intention could be inferred as to the disposition of the *residuum* of his estate.

We are able to find none, except we are to adopt the construction of the wife's counsel and presume that the testator, who had lived so long on the Rienzi place that he had identified it with his entire fortune and considered everything which had been made upon it as a part of Rienzi. But even then the whole general estate would not go to the wife, as he says: "I will that my wife do have one-half of everything belonging to Rienzi. In case a favorable opportunity is not afforded for the sale of the place, he says his wife shall be credited with the proceeds. But this expression, unexplained by others and standing alone, will not justify the interpretation that she was intended as the residuary legatee. It is an evidence, however, of the intention of the testator that his wife was to receive the net proceeds of the crop until the plantation finally passed from the control of the executors.

No particular form of words, it is true, is requisite to constitute one a residuary legatee. It must appear, however, to be the intention of the testator that the residuary legatee shall take the residue of the estate after payment of debts, and meeting all the appointments of the will. Williams, Executors, 1310, *et seq.*

Jarman, Vol. 8, p. 2, says: "In some instances, however, in favor of the restricted construction, founded on subsequent expression, description of a particular species of property, has not been allowed to prevail against the force of the previous general words." In the cases cited for this textual declaration, there was some expression as to the disposition which showed that it was the intention to pass the residue of the estate.

Thus in *Benet vs. Bachelor*, 1 Ves. Jr: 63, there was after the previous general words, the expressions "and other, not before bequeathed goods and *chattels* that he should be in possession at the day of his decease."

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In *Campbell vs. Prescott*, 15 Ves. 505, the testator gave to his two sons all his sugar-house, cupola and merchandise, stocks, with jewels, plate, household goods, furniture *and all effects whatsoever*.

In *Michel vs. Michel*, 5 Madd., 69, after a bequest of linen, china, household goods and furniture, the words were followed by "and effects he shall die possessed of."

And in other cases cited, there are expressions such as: "*and all his other effects*"; or whatever else I may then be possessed of at my decease," "his wines and property in England." In all these cases "the mere enumeration of particular articles, followed by a general bequest, did not of necessity restrict the general bequest, because a testator often threw in such specific words, and then wound up the catalogue with some comprehensive expression for the very purpose of preventing the bequest from being so restricted." Jarman, Wills, 362.

Mr. Jarman says, p. 344: "These cases indicate the disposition of the judges of the present day to adhere to the sound rule, which gives to words of a comprehensive import their full extent of operation, unless some very distinct ground can be collected from the context for considering them as used in a special and restricted sense."

"It is to be observed, however, that in all the preceding cases there was no other bequest capable of operating on the general residue of the testator's personal estate, if the clause in question did not. Where there is such a bequest, it supplies an argument of no inconsiderable weight in favor of the restricted construction, which is then recommended by the anxiety always felt to give to a will such construction as will render every part of it sensible, consistent and effective."

There was no expression in the will following the particular description of the property after the general description of "all corporeal" movables to indicate that the wife was to have the *residuum* of his personal estate; nor is there any indications of any intent to make any other legatee the recipient of this *residuum*. We are forced to the conclusion from a consideration of the entire instrument that he intended the balance of his personal estate to go to his legal heirs, a disposition, in doubtful meaning, which the law favors.

The will speaks from the death of the testator that being the point

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of time at which it becomes operative, 21 Conn. 550-516; unless the language used, such as the word NOW, or a verb in the present tense which requires it to be taken at the time it is used. 1 Jarman, Wills, 318.

But it will receive the former interpretation if it can reasonably be made to bear it. 2 Cox Ch. 384. It is plain from the terms of the will that the testator intended that the plantation should be sold, and the proceeds distributed as directed by him. Speaking from the time of his death for the future sale of the property, he said to his executors that they should sell the Rienzi plantation and distribute the proceeds; and until they did sell it, the proceeds should go to the wife. The legatees could not sue immediately after the death of the testator, for a partition in kind, as this would have been contrary to the positive mandate of the testator. The plantation was directed to be sold in the most positive language. The legatees then were only interested in the proceeds of the sale. The net proceeds belong to the wife from the time of the death of the testator until the sale of the place. No other reasonable interpretation can be given to the language of the testator. If the plantation should have been sold with the growing crop, it would have passed with the place and increased the proceeds.

So long as the plantation remained in the hands of the executors, Mrs. Allen was entitled to the proceeds of the crops. If not sold in accordance with the directions of the testator it is only at the moment of delivery to the legatees if they choose to hold it in indivision that the growing crops pass to them as part of the immovable.

The testator says that "I will that my wife to have a one-half of everything belonging to Rienzi." This declaration is explanative of the desire that his wife should have one-half of the plantation, mules, tools, etc. The wife under this declaration is entitled to one-half of everything on the plantation, attached to the same, immovable by nature or by destination, or by the object to which they are applied. C. C. 462, *et seq.*

Everything on the plantation, placed there for its service, is immovable by destination if it is essential for the gathering of the crop, preparing the same for market, or for the improvement of the quality of the land, or to feed the stock and cattle necessary for working the same.

The manufacture of sugar is the preparing of the crop of cane for

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market. Coal is an essential thing for the running of the machinery of the sugar house. Although not mentioned in the Code, it is to be classed, if destined during the grinding season for the service of the mill, as immovable by destination. The hay, corn, fodder and coal were placed on the plantation for the use of the place and consumed in the cultivation of the plantation, in working the crop and preparing the same for market. The legal heirs are not entitled to the value of the same. The timber and the old iron were not essential for the use of the plantation and were not employed for the cultivation of the same. They therefore fall into the *residuum*.

Immediately after the legacy of the one-half of the plantation and a claim the testator held against the Federal government is the language: "And to the five children of my sister Cynthi A. Smith, Gaston Smith, Fred. W. Smith, Jr., Mrs. Nellie Huchens, Ogden Smith and Thomas A. Smith." There is no period after the bequest to the Allen heirs, but this as a distinct sentence follows. We know that the testator was not familiar with the English language; that he was deficient in the use of words, used capitals indifferently, and was not proficient in composition. That he intended that his sister's children should participate in this bequest, is evident from the subsequent language in the will bequeathing to Fred. W. Smith his note for five hundred dollars as "part of his share heretofore given him." He had given no "share" except in the bequest to the Allen and the Smith heirs. He evidently had in his mind a bequest to his sister's children.

Following immediately the bequest to the families of his brother, Thomas H. Allen's four children, is the legacy to the children of his sister, and the testator intended to make a continuous sentence and to provide for his sister's children as liberally as he had done for those of his brother.

We are satisfied from the entire context of the will that the testator intended that his sister's children should participate in the legacy of half of the plantation, and the claim against the government of the United States.

When the reading of a whole will will produce a conviction that the testator must necessarily have intended an interest to be given, which is not bequeathed by express and formal words, the court will supply the defect by implication, and so mould the language of the testator as to carry into effect, as far as possible the intention which

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it is of opinion that he has on the whole sufficiently declared. *Metcalf vs. Farmington Parish*, 128 Mass. 375; *Boston Safe Deposit & Trust Company vs. Coffin et als.*, 8 Lawyers' Reports, p. 748; 25 N. E., 80; *Post vs. Huger*, 38 N. Y. 599.

Punctuation must give way whenever it interferes with the proper and reasonable construction of a will. 8 Lawyers' Reports, p. 744, notes; 25 N. E. 80.

The devise to his brother's children should be connected with the devise to his sister as one continuous sentence.

He gives to the families of his brother's four children. They do not take therefore *per capita*, but *per stirpes*. The number or the names or the children are not mentioned. In the bequest to the sister's children there is no language used which would justify the inference that the testator intended that they should receive differently from the families of his brother's children. The legacy is to the five children of his sister, and construing this in connection with the bequest to his brother's children's families, it is clear to our minds that the testator intended that these five children should be grouped as a family, and take *per stirpes* as the children of his brother's families. Each set of children is therefore entitled to one-fifth. *Hyatt vs. Pugsley*, 23 Barbour, 299.

To the three nieces named in the will, it says that they are to receive five hundred dollars more in cash, and have no interest in any other claim. They had received five hundred dollars each, and the legacy to them is plain in its meaning, that each was to receive five hundred dollars in addition to that already given to them by the testator in his lifetime. They are to have no interest in any other claim. As to the residuum of the estate, the testator died intestate. They could have no interest in any claim given to other legatees. They could possibly lay claim to nothing else than the *residuum* of the estate. The testator must have referred to this, for there is no other fund upon which the legatees could assert any right. They are therefore excluded from any participation in the *residuum* of the estate.

Although opposition was made, for uncertainty of that part of the will which directs that a good education should be bestowed upon the two boys of Mrs. Cragin, we do not find the matter discussed in the briefs of counsel. We presume, therefore, that it has been abandoned. But as the account of the executors are not final, and

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the question may hereafter be raised, we will pass upon this part of the will.

The rule in regard to the inadmissibility of parol evidence, to vary, contradict or to render intelligible the words of a will, is not essentially different from that which obtains in regard to contracts. It may be received to show the state of the testator, the nature and condition of his property, his relations to the contestants, and all the surrounding circumstances. But this is done to place the court in the condition of the testator, in order, as far as practicable, to make them the more fully to understand the sense in which he used the language found in his will. 1 Greenleaf Ev. Par. 287-289; Jarman, Wills, 849, notes.

But parol evidence is not admissible to supply any words or defects in the will. *Id.* 28 Barb. 285; 27 Ala. 489.

In this case there is no reason to supply any words or defects in the will. There is no doubt as to the intention of the testator or to the subject matter of the bequest.

The testator has defined his object with reasonable certainty, and the court can, from the data furnished by him, ascertain the amount necessary to carry into effect his intention. The judge heard evidence as to the amount necessary to educate the two boys of Mrs. Oragin, and in thus acting he did not vary or avoid the intention of the testator, or in any way contradict any part of the will. *McCorn vs. McCorn*, 100 N. Y. 511; 13 West Rep. 614; 12 West Rep. 857; 144 Mass. 164; 18 How. 385.

We find no reason to disturb the rulings of the District Judge on this issue, nor do we find any error in his ruling as to the attorney's fees and the commissions of the executors. The succession is in no condition for final settlement. The crop of 1894 has not been disposed of and the sugar bounty claim uncollected. *Succession of Gardere, ante* p. 289.

The judgment appealed from is amended so as to give to Mrs. Bettie Allen the net proceeds of the crop on Rienzi plantation for the year 1894, and to one-half of the plantation, one-fifth interests in same to each of the families of R. H. Allen, Jr., T. H. Allen, Jr., Harry Allen; one-fifth to Mrs. Latham, and one-fifth to the children of Mrs. Cynthia Smith.

In all other respects the judgment is affirmed, the succession to pay costs of appeal.

Martin vs. Athletic Club.

ON APPLICATION FOR REHEARING.

The applicants for a rehearing have misinterpreted our decree. It does not say, nor was it intended to convey the impression that the funds ready for distribution should be withheld from those entitled to the same under the will. The succession is to be continued in its administration until the payment of the bounty, when it will be distributed according to law.

All funds ready for distribution must reach their destination without unnecessary delay.

Rehearing refused.

No. 12,012.

MRS. ANN MARTIN VS. SOUTHERN ATHLETIC CLUB.

When property has been seized and sold in a suit to which the owner was not a party, and the purchaser sells the same to another, and it is assessed in the name of the latter and sold at tax sale, the assessment and sale are null and void.

It is not essential that property should be assessed in the name of one possessing both the equitable and legal title in order that the assessment may be legal and valid. But there must be a *prima facie* title to serve as the foundation of a valid tax sale. The evidence must be on record to show that the owner was divested apparently of title by proceedings against him.

48	1051
51	948
51	953

APPPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

William Winans Wall, for Plaintiff, Appellee.

J. Zach. Spearing, J. J. McLoughlin and Lloyd Posey for Defendant, Appellant.

Argued and submitted March 13, 1896.

Opinion handed down April 6, 1896.

Rehearing refused June 1, 1896.

The opinion of the court was delivered by

MCENERY, J. This is a petitory action instituted by plaintiff to recover certain immovable property in the possession of defendant. The plaintiff sued in the capacity of widow of James Martin, al-

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leging that the property belonged to the community and that she is the owner of one undivided half, and usufructuary of the other half.

There was judgment for plaintiff, from which the defendant appealed.

The defendant claims title through a quit-claim deed from J. A. C. Wadsworth, who obtained a like title from Van Norden. Van Norden acquired title from one Delano, who purchased the same at judicial sale November 4, 1875. The property was assessed to Van Norden and was adjudicated to the State for taxes, and subsequently the State Auditor sold the property to John Spansel, who sold to defendant. The quit-claim deed alluded to was intended to perfect defendant's title. It will be unnecessary to follow the discussion of the parties relative to the effect of the tax sales further than to inquire, was there such an assessment of the property as to conclude the plaintiff from contesting the same for the purpose of showing that her deceased husband, James Martin, was never divested of title to the property, and the assessment of the same in the name of another party was null and void and could be the basis of no valid tax sale.

Jonas Pickles sold the property in controversy to James Martin in 1852. On November 5, 1875, a *fl. fa.* issued from the Superior District Court, in the parish of Orleans, in the suit of Drainage Company vs. Jonas Pickles, and the property was seized, and sold and adjudicated to Delano. Martin was not made a party to the suit in which the *fl. fa.* issued. There could be no divestiture of Martin's title by a sale under said judgment. Delano, therefore, acquired no title whatever to the property, and he could convey none to any purchaser from him. Van Norden, who purchased from him, acquired no title, and the assessment of the property to him and the sale under the assessment were null and void. There were two titles on record: one in the name of James Martin, and there was no evidence of record that by any act of his, or through any proceedings instituted against him, that he had ever parted with title to the property. The other title in the name of Delano, transferred to Van Norden, was an absolute nullity, and the tracing of it but for a short period would have informed the assessor that no proceedings had been instituted against Martin by which he was divested of title. There was no connection whatever between the titles of Van Norden and James Martin. They were distinct and independent, the former showing

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that the title was derived from a proceeding to which James Martin was a stranger, and the sale to Van Norden of the property of another—of James Martin, who could not be divested of his property without due process of law. The facts presented bring this case directly within the ruling of *Lockhart vs. Smith*, 47 An. 124.

We have held that ordinarily it is not essential that property should be assessed in the name of one possessing both the legal and equitable title in order that the assessment be legal and valid. *Prescott vs. Payne*, 44 An. 650.

But there must be a *prima facie* title to serve as the foundation of a valid tax sale. *Id.*

There must be on record some evidence to show that the original owner voluntarily parted with title, or that there were proceedings against him which apparently divested his title, such as were in evidence in the case cited, and the authorities therein referred to.

The assessment was not in the name of the owner of the property as shown by the records, and was therefore absolutely null and void. No vested tax sale can be predicated upon an absolutely null and void assessment.

Judgment affirmed.

No. 12,106.

J. B. B. LAY VS. HIS CREDITORS.

When there is no substantial compliance with the law requiring the debtor seeking a respite from his creditors, to file a schedule of his assets sworn to by him, and instead of promptly supplying the deficiencies when called on by his creditors, he fails to comply with the call, the order for the respite should be set aside. *Civil Code, Arts. 2067 et seq.*; *Pecquet vs. Golis*, 1 Martin, N. S. 438; *Phillips vs. Her Creditors*, 85 An. 904.

APPPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Lloyd Posey for Defendant in Rule, Appellee.

W. S. Benedict for John B. Henry, Mortgage and Privilege Creditor, Plaintiff in Rule, Appellant.

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Submitted on briefs April 24, 1896.

Opinion handed down May 4, 1896.

Rehearing refused June 1, 1896.

The opinion of the court was delivered by

MILLER, J. The appeal is by a creditor of the insolvent from the judgment maintaining the respite proceedings sought to be set aside by the creditor.

The law requires that the debtor seeking a respite shall file correct and full schedules of his property and liabilities; and the order for the meeting of creditors and the other requisites to obtain the respite demand that attention from the debtor which the litigant seeking relief usually bestows on his suit. Civil Code, Arts. 3084, 3087 *et seq.* The schedule of assets in this case states the amounts of bills receivable, open accounts, and money loaned, with no specification of the debtors or other details of interest to the creditors of the insolvent. This imperfect statement called for the rule of the creditor on the debtor for a better statement of assets, but produced no result. Nor were any steps taken by the debtor to carry into effect the order for the respite, and since September, 1895, he has enjoyed all the advantage from the restraint the order imposed on his creditors. The record, in our view, exhibits the disregard by the debtor of the conditions of a full and correct statement of his affairs and diligence in prosecuting his application, the law exacts for the relief it extends to insolvents.

The rule of the creditor to compel a proper statement of his affairs proving ineffective, the creditors supplemented it, by the demand in the form of an exception, that the respite order be annulled. On the issues made by the creditor, he produced a mass of testimony tending to show that the debtor had not accounted for all his property. On this branch of the case we do not find it necessary to express any opinion. The remedy of the creditor against an order for the respite obtained by the debtor under the circumstances shown by the record is to set it aside. A schedule utterly deficient as this is in the informations it should convey is no basis for a respite or a cession. This ground is strengthened, if assistance is needed, of no attempt to supply what the law requires though called for by the creditor's rule, and by the additional fact that for over a year the

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debtor has been enabled to tie the hands of his creditors by the order to which he was not entitled, without fulfilling the conditions exacted by the Code. *Pecquet vs. Golis*, 1 N. S., p. 438. *Phillips vs. Her Creditors*, 36 An. 904.

The copy of the petition filed in this court of the debtor and the order made on it of date the 22d April, 1896, accepting his cession, the petition referring to the respite proceedings reviewed in this decision, and which seems to be the basis of the order accepting the cession, can exert no influence on our determination, or affect that relief sought by this appeal.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be annulled, and it is now ordered and decreed that the order for the respite obtained by the debtor, and all proceedings based on it, be avoided and annulled, and that the appellee pay all costs.

No. 12,058.

GRACE F. CHAMBERLAIN ET ALS. VS. THE CITY OF NEW ORLEANS.

The order of court, recognizing plaintiffs as heirs of the deceased, and placing them in possession of his property, is not evidence of his title in a suit by the heirs asserting the ownership of their ancestor brought against the party claiming title.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Kernan & Wall for Plaintiffs, Appellants.

E. A. O'Sullivan, City Attorney, *Geo. W. Flynn* and *Henry Renshaw*, Assistant City Attorneys, for Defendant, Appellee.

Argued and submitted March 28, 1896.

Opinion handed down May 4, 1896.

Opinion on rehearing handed down June 1, 1896.

The opinion of the court was delivered by

MILLER, J. The plaintiffs, alleging themselves heirs of Charles M. and Edward Chamberlain, appeal from the judgment, dismissing

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their suit to annul an adjudication to the city of the property they claim; to have annulled the taxes on the property for the years 1880 to 1889, and to cancel the inscriptions of the tax assessments for these years, and for the years 1893 and 1894.

The grounds set forth in the petition are, that the taxes for the years 1880 to 1889 are assessed in the names of C. and E. Chamberlain and that Charles M. Chamberlain, intended by the assessment C. Chamberlain, was dead when the assessments were made; that the assessments for 1893 and 1894 were respectively in the names of Vidou and Baltz, never owners; that the taxes are prescribed and the adjudication to the city is void, because of the illegal assessment, and the absence of notice to plaintiffs, the owners, and other grounds are urged. The answer is the general issue, and an affirmation of the validity of the taxes and the adjudication.

The plaintiffs suing as the heirs of Charles M. and Edward Chamberlain, it was indispensable to prove their ownership of the property, the subject of this suit. The petition avers that Charles M. and Edward Chamberlain acquired part of the property by purchase and another part by inheritance. These averments have not been supported by any proof of title. We have in the record the judgment of the Civil District Court, recognizing the plaintiffs as the heirs of Charles M. and Edward Chamberlain, and in the body of the judgment there is the description of the property plaintiffs claim in this suit and a decree putting the plaintiffs in possession. To this judgment, as proving ownership, the city objected, and in our opinion the objection was well founded. The title the city asserts and the assessments for taxes the city maintains can not be disturbed by a judgment in an *ex parte* proceeding, decreeing the plaintiffs' ownership. If the judgment is accepted to prove heirship it has no tendency to prove that plaintiffs or those under whom they claim were or are owners of property assessed as that of E. and C. Chamberlain. *Glover and Others, Heirs, etc., vs. Doty*, 1 Rob. 130.

The judgment of the lower court should have been one of non-suit.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and that plaintiffs' suit be dismissed as in case of non-suit, and that defendant pay costs of appeal, plaintiffs those of the lower court.

Bland and Wife vs. Railway Co.

ON APPLICATION FOR REHEARING.

We will modify our decree so as to remand the case for further proof. It is therefore ordered, adjudged and decreed that our former judgment be set aside and the case is remanded to the lower court to enable the parties to offer additional testimony and for another trial.

No. 12,178.

D. A. BLAND AND WIFE VS. SHREVEPORT BELT RAILWAY COMPANY.

The lineman of the defendant company in the discharge of his duty was ordered to take down a guy wire from an electric pole and guy tree. The pole had not been securely planted. It fell on the lineman, inflicting injuries of which he died. The vice of construction was latent and concealed. The officers of a preceding board of management had been notified of the defect. The company is not relieved under the plea of want of notice, although the present general manager had not been notified, but the preceding manager or superintendent. The lineman did not voluntarily place himself in a dangerous position. The employee is not bound to know latent, but only patent defects. The master must provide suitable appliances.

48 1057
51 115

A PPEAL from the First Judicial District Court for the Parish of Caddo. *Land, J.*

Leonard & Randolph for Plaintiffs, Appellees.

Wise & Herndon for Defendants, Appellants.

Argued and submitted June 4, 1896.

Opinion handed down June 15, 1896.

The opinion of the court was delivered by

BREAUX, J. The plaintiffs claimed damages for the death of their son, Charles M. Bland, aged about twenty-two years and unmarried. He was electrician and lineman; the witnesses state, of the defendant company.

The latter operates a belt line, electric railway, in the city of Shreveport. The electricity is supplied through a trolley wire hanging over the roadbed, by means of suspension wires fastened to poles standing on each side of the road. The height of these poles

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is about twenty-five or thirty feet and their diameter eight or ten inches. On a straight line these poles are planted at a depth of about five feet, on curves about five feet and a half.

It became necessary to take down a guy wire attached to one of these poles, on a curve.

The superintendent of the company with the lineman, the late Charles Bland, went to the pole to remove the wire. The former suggested to the latter to cut the wire from the tree. "No," was the latter's reply for the reason that "the wire will remain attached to the pole and will be in the way."

The superintendent also offered to climb the pole and himself do the work required. The lineman being more active and nimble went up after the soundness of the pole had been tested. Reaching the point at which the guy wire was attached to the pole he clipped the wire with his pliers; immediately after, the pole commenced to give way with the young man and fell on him.

He died about seven hours afterward from the effects of the fall.

It is in evidence that the pole was two feet in the ground; that the ground was wet at the time as it had rained the previous day.

The defendant pleads that the accident was caused by the lineman's want of care and caution; that he was aware of the danger of the employment.

The jury found a verdict for the plaintiffs in the sum of twenty-five hundred dollars. After an ineffectual attempt to obtain a new trial from the verdict, the defendant appeals from the judgment.

Before the guy wire was removed the offending pole was safe; it remains, none the less, that without this wire it was entirely unsafe. We have seen that moving the wire was a necessity, rendered so by the fact that the guy tree was on the right of way of another railroad. The removal was ordered by the defendant company, under whose order the two, its superintendent and lineman, acted. The company's order was to take down the wire and take it out of the way.

It is well settled in order to support an action for personal injuries two things must concur, the want of proper care and caution on the part of the defendant and no fault on the part of the plaintiff.

If the defendant was notified of the vice of construction at the place the accident occurred and failed to make needful repairs within a reasonable time, it became responsible for injuries resulting from the fall of the pole.

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It is but fair to the present management to state that it does not appear of record that they had any knowledge of the defect. It is in evidence, however, that in 1893 the one who was lineman of the company, reported to the superintendent that this pole was weak, threatening and that it needed resetting.

These employees are no longer in the service of the company.

The corporation itself has not changed, and it is bound by the knowledge of its employees, at the time, had. Notice to the agent was notice to the principal. We are informed by the testimony of the witness Huddleston, that the superintendent's reply was (when he was notified) that the pole would be reset later, in dry weather; it was in wet weather that he gave the information and was directed to attach the guy wire. If this witness stated correctly, and we have no reason to think that he has not, the resetting should not have been indefinitely postponed as it was.

Having reached this conclusion in regard to the defendant, we are brought to the plea of contributory negligence urged by the defendant against any right of plaintiffs to recover damages.

The inquiry here is whether the danger was concealed or the surrounding condition of things such, as to warn the lineman who was injured?

The proposition does not admit of discussion; that while it is the general duty of a master to exercise needful care and caution to prevent the exposure of his employee to great risks, the employee on the other hand must exercise ordinary diligence in guarding against injuries.

The guy wire was one hundred and twenty feet in length from the top of the pole, where it was attached to the trunk of the guy tree.

Had he cut the guy wire at the china tree that served as a guy post he would have been out of all danger. At the same time it is evident that the work would have been only half done. It would not have been workmanlike to leave that many feet of wire hanging from the pole. Moreover, there were leaks in the electric wires. The pole was marked as one of the "leaky" poles. The plaintiffs assert that in wet weather the wire might become charged and be dangerous to any one coming in contact with it, and that it was prudent and proper to cut off the electric fluid.

Be this as it may, it was most assuredly not unreasonable on the part of the lineman to lessen the work by cutting the guy wire at the pole as he did, instead of cutting it at the guy tree.

Bland and Wife vs. Railway Co.

In the second place (having concluded to cut the wire from the pole), it is urged by the defendant that there was negligence in not having used the appliances in his possession and under his control belonging to the company. These appliances, we are informed, were a "block and fall" and "come alongs." The evidence as to the use of these appliances is conflicting as to whether they are intended for removing wires. Several of the witnesses confine their use principally to pulling up the slack in the wire or letting off the slack gradually. Be all that as it may, not one of the witnesses has sought to prove that it was at all unusual or unreasonable to climb the pole and cut the wire as was done. Knowledge of the danger is not shown, nor is it evident that there was a want of ordinary care and prudence to avoid the usual dangers to which linemen are exposed. It is in the line of their duty to climb these poles to attach or detach wires and in performing such work as is needful in keeping up the system of which they in part have charge. They are provided with spurs for the purpose and have other appliances to enable them to climb and dispatch the work.

A lineman is not unreasonable or imprudent who takes it for granted that a pole was planted at the usual depth. The evidence that the accident could not have occurred if the pole had been planted at the usual depth, is uncontradicted. The fact that after the accident it was planted some five feet and a half in depth and that all guy wires are since dispensed with is significant and leads to the unavoidable conclusion, that if it had been properly put up in the first place the accident would not have occurred.

Generally the office of the guy wires, we are informed, is to steady the post and prevent its movement or vibration. If the post bends or gives away in a curve, particularly, the trolley wires no longer remain plumb and the trolley wheel leaves the wire. We think in this case the guy wires performed double duty: to support the pole, also to lessen its vibration. It became evident after the fall that it was a support of the pole, but this support was not apparent before the accident, for the reason that nothing indicated that the planting was too shallow for it to be secure without the guy wires.

The post stood at a point of the curve upon which there was great strain, it is true. The force, however, was not greater than an ordinary post could withstand.

The sufferer was not guilty of contributory negligence as the act of

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climbing such poles is not unusual with linemen. The employee assumes the ordinary "risks of the employment which are apparent and which he has the opportunity to detect." Buswell, Sec. 204.

Here the risks of the employment were not apparent and the employee had no opportunity to detect the vice of construction. The superintendent who was present, and the victim of the accident did not, in the least, suspect the unsafe condition of the pole in question.

There are two items of damages claimed:

1. The alleged pain and suffering.
2. Compensation for the loss of the support and assistance to plaintiffs, if he had not been fatally injured. As to the first there is no moneyed standard of measurement. In a possible view of such cases no amount would be excessive and sufficient compensation.

But in fixing the amount the ability to pay and precedents applying must be considered.

As to the second, one of the plaintiff is between seventy-five and eighty years of age, and the other about sixty.

The deceased was getting sixty dollars a month wages. There is uncertainty as to the amount of contribution that a young man may make to the support of his parents. It may be considerable, or it may be very little, without violating the demand of duty.

The damages are fixed at eighteen hundred dollars.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended by reducing the amount allowed from two thousand five hundred dollars and interest to eighteen hundred dollars and interest thereon from March 17, 1896.

As amended, the judgment is affirmed at appellee's costs.

No. 11,961.

BOARD OF CONTROL VS. M. C. ROYES ET ALS.

A deduction may be drawn from the statement of a witness, (such as the amount of a fee or charge on a vessel of itself shows the tonnage of the vessel) without any statement by the witness in regard to the number of the tonnage.

The evidence was brought out in chief and no attempt was made to show that it was erroneous.

Accounts must be proven by reference to the respective items and not by average of other items of debts of another date and for different fees or charges.

Board of Control *vs.* Royes et als.

A verified copy of a report is admissible in evidence and makes proof on the testimony of a witness who knew that it was duly verified.

The claims, sustained by sufficient evidence, are allowed. A non-suit is entered as to those not thus sustained.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

M. J. Cunningham, Attorney General, for Plaintiffs, Appellants.

George L. Bright for Succession of Royes and José Fednandez, Surety, Defendants, Appellees.

Argued and submitted May 9, 1896.

Opinion handed down May 18, 1896.

The opinion of the court was delivered by

BREAUX, J. The plaintiff brought this suit against the late superintendent of the "New Basin Canal and Shell Road" and sureties on his official bond, for amounts collected, and for which, it was charged, no account had been rendered.

The defendants interposed exceptions; they were overruled.

In their answer they plead a general denial, and especially set forth that they are not indebted for any sums of money the treasurer of the company failed to pay or account for, as he was not a subordinate of the superintendent, for whom the latter could be held responsible.

The amount claimed by the plaintiff was six thousand three hundred and twenty-five dollars and ninety-eight cents. In support of this claim plaintiffs annexed statements to their petition.

The first statement is based upon a number of "permits" or "passes" collected from different persons to whom they were issued for tonnage or towage.

The statement gives a correct account of the "passes" or "permit;" dates, who issued them, the number, the amount of tonnage of the schooner, the tonnage paid and the towage paid.

Section 16 of the Statutes of 1888 requires that the superintendent shall cause to be kept a registry of all arrivals in the canal and of all travel on the shell road. It is also made his duty to record

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on this registry a description of all cargoes brought in. He is also commanded by the statute to furnish to the State Treasurer a certified list of all amounts received, and to exhibit to that officer a certified statement of the bank showing the deposits made to the credit of plaintiff's fund, for his examination and comparison with the superintendent's account of receipts and deposits. The statute further orders that the superintendent shall at the same time exhibit to the State Treasurer, a sworn statement of all expenditures made.

It was suspected at the time there were irregularities, it seems; a copy of these reports of the superintendent for stated months was obtained.

After examination it was found that amounts collected were not properly returned. Receipts of amounts paid to the company's treasurer, were not mentioned in the report of the superintendent. In other words the report to the State Treasurer was not a true report of the company's business.

In addition to these receipts found with the customers of the canal, who held them for a complete consideration, plaintiff claims to have shown an indebtedness by proving that a permit book, containing blank permits numbered serially was stolen. The number of permits having been fixed, the plaintiff seeks to recover the amount by reference to the average price of permits.

Another claim is headed: "Statement of sundry collections made for account of New Basin Canal and Shell Road by A. P. Williams, secretary, and not accounted for." They consist of collections from Poitevant & Favre, Pelican mills: rents and other claims, and lastly, there is a statement annexed to the petition numbered four, of an amount of three hundred and five dollars due for "the investigation of the defalcation of the past administration" of the board of control.

The defendants, after having conclusively shown that the superintendent was not guilty of embezzlement of any part of the funds, sought to sustain the defence that plaintiffs had not made a case by proof sufficient to enable them to recover a judgment against either the superintendent or the sureties on his bond.

The judgment of the District Court condemned the defendants to pay to plaintiffs the sum of twenty-one hundred and eighty-five dollars and five cents with legal interest from judicial demand.

From the judgment the plaintiff prosecutes this appeal.

The superintendent was authorized to appoint a book-keeper and secretary of the board with approval of the board of control. He was given the power of requiring this employee to furnish a bond. If he chose to entrust him with the additional duty of handling the fund as treasurer, without bond, he, by showing that this officer was unfaithful and diverted the funds, is not relieved from responsibility. To the superintendent was given control and management. The condition of his bond was "the faithful performance of his duties and of the duties of all" the officers and employees subordinate to him in the management of the affairs of the company. The superintendent unquestionably was responsible for the amounts received by the secretary whom he chose to trust as treasurer, without even requiring the usual bond.

The record does not disclose that the board of control opposed the appointment by the superintendent of this book-keeper and secretary; nor does the record show that the superintendent made, at any time, any attempt to remove his subordinate who finally proved himself entirely unworthy of confidence.

This being the responsibility of the superintendent, we will take up, in their order, the bills of exceptions to which counsel has directed our attention in the argument. The board of control, while investigating the affairs of the basin, procured from shippers, owners of schooners and others, who carried on business on the basin, two hundred and twenty-eight permits.

A statement setting forth these permits, and the permits also, were offered as evidence and admitted.

The objection to their admissibility was that they were not sustained by proof and were not sufficiently identified; a condition precedent, it was urged, to their admissibility.

The *gravamen* of the complaint is that at the time they were offered it had not been shown by whom the statement offered had been made, and the *data* upon which it was based.

It is in proof that the statement was made by the secretary of the board, who succeeded the former secretary; they were made *after* the irregularities charged; or some of them, at any rate, had come to light. The *data*, which are the basis of the statement, were in his office and in his possession.

He testifies that the statement is a correct account of the "passes"

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or "permits;" that it is a true transcript. This statement was really a part of the evidence of the witness, and was prepared to assist the court in referring to the different items, and as such, it was properly admitted in evidence.

The "permits" or "passes" issued by the secretary were also properly admitted. Found as they were, in the possession of those who paid for them, they are direct evidence of amounts received for the canal company. It devolved upon the defendant, the receipt having been shown, to prove that it was deposited in bank as required.

It is urged, as to a number of these "permits," the evidence is incomplete, for the reason that on their part face they do not show the tonnage of the vessel.

The amount of dues of the vessel is determined by its tonnage. It was a question of sufficiency of proof and not of admissibility; the ruling admitting these "permits" in evidence was not an improper ruling.

This brings us to the "permits" issued by Williams, the secretary, and not found. The statement objected to as evidence, on this point, is headed "statement of two hundred and seventy-one 'permits' issued by A. P. Williams, secretary, and not found." These permits were numbered serially. There were numbers missing. We do not, at this time, pass upon the sufficiency of the evidence.

The evidence was admissible and was properly admitted, at least as a commencement of proof.

The reasons assigned in another bill of exceptions against the admission of a copy of the superintendent's report are that it was not signed; that it was not duly verified.

It was the monthly report of the superintendent who can not be heard to urge his own omission, in not having signed it as required by the statute.

It was regularly deposited as required in the office of the State Treasurer. The evidence was admissible in the form presented. The copy admitted had been verified by a clerk employed by plaintiff and an employee in the office of the State Treasury, as shown by the former's testimony on the trial. Although it is not shown that the State Treasurer is especially appointed by law to furnish copies of these reports; we incline to think that he is authorized. Greenleaf, par. 485, 12 Ed. A copy, however, without that certificate, duly verified and supported by ample corroborative testimony is also admissible.

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The points in other bills are not expressly passed upon by us for they do not present grounds that would justify us in changing our conclusion on the merits of the case.

MERITS.

With reference to the sufficiency of the proof it is evident that eight hundred and fifty-three dollars and twenty-seven cents are due.

The remainder of this claim is proven by the testimony of the present secretary. The permits making up the amount are in evidence, showing the amounts collected. While the tonnage was not stated by the witness the amount charged fixes the tonnage.

In the absence of all attempt to show error by cross-examination or by rebutting testimony of some sort, we will not assume that the witness testified in error.

Having stated the amount due, although the amount was not carried on the stub, the inference is unavoidable; that he, the witness, was aware of the tonnage of the vessels by reference to other data in his possession. The vessels are all named in these "permits," and presumably their tonnage is well known. An examination of the report of the superintendent and comparing it with the "permits" and "passes" in possession of plaintiff discloses that no return was ever made of the amounts represented by these "permits."

The whole sum sustained by the "permits" in evidence is due by the defendant.

We pass from these "permits" in possession to those said to have been issued and not found.

There were books abstracted from the office. The irregularity of the business was, to say the least, confusing. The safest check was the blank "permits" serially numbered, for which some one should have been held responsible. It does not appear that any account was taken and kept of the number placed in the hands of the officer to be issued when called for by the captains of schooners and others to whom they were to be issued upon the payment of the fee. There was general neglect and indifference about the stubs of the "permits" or "passes."

We are informed by the evidence that a mistake arose because of the error of the printer in printing the blank "permits," with numbers on the margin, we understand, to save labor of writing and noting them as they should have been.

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That some of the blanks were soiled and were for that reason destroyed.

That the secretary was not careful in copying the numbers, and at times omitted them in his report.

There is lacking another element of certainty. After having collected the omitted numbers, the witness made an average based upon the amount shown to be due on the "permits" of the company in its possession—i. e., a given number of "permits" in regard to which there was no question as to the amount, having footed a stated sum; another number of "permits" was supplied with amounts by adopting an average based upon the first number. The average is not supported by other proof of any kind. We do not think that the evidence sustains this claim. The evidence does not relate to the claims.

We come to the last items charged: Statement 3, of sundry collections said to have been made for the canal and for which it is charged, no account has been rendered, and statement 4 of expenses incurred by the company in investigating the irregularities existing.

We take up the last item first, and as to it determine that the company must examine into the mismanagement of its officers and consequent irregularities at its expense and not at the cost of the superintendent, who is responsible for the shortcoming of his subordinate, although not guilty himself of embezzlement.

The other claims on these statements are not supported by sufficient proof. A small amount is claimed for rent of property, whether it was collected or not is not stated in evidence, and other comparatively small claims are made we think should not be allowed without further proof.

It is therefore ordered, adjudged and decreed that the judgment is affirmed, with the following amendment: to the plaintiff is reserved the right to sue, and the part of the demand not allowed is dismissed as in case of non-suit.

The appellant is condemned to pay costs of appeal.

No. 12,117.

STATE OF LOUISIANA VS. FLEMING ROBERTSON.

On an indictment for shooting at with intent to kill and murder, a request that the court instruct the jury that it could, under the indictment, find the defendant "guilty of assault and battery," or "guilty of an assault," was properly refused.

48	1087
50	596
48	1087
107	302
107	303
48	1087
111	966
48	1087
116	25
116	26

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A PPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

M. J. Cunningham, Attorney General, and *R. F. Broussard*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

A. & Charles Fontelieu for Defendant, Appellant.

Submitted on briefs May 9, 1896.

Opinion handed down June 15, 1896.

The opinion of the court was delivered by

NICHOLLS, C. J. Defendant, indicted for having, with a dangerous weapon, to-wit, a pistol, commonly called a revolver, wilfully, feloniously and of malice aforethought, shot one Charles Duval, with intent to kill and murder, requested on the trial of the cause that the court instruct the jury that it could, under the indictment, find the defendant "guilty of assault and battery," or "guilty of an assault." The court refused to so instruct the jury and defendant excepted and reserved a bill of exceptions. The jury found the accused "guilty of shooting with intent to kill." On appeal defendant assigns the action of the District Court as error and asks that the verdict and sentence be set aside.

The Attorney General contends that the accused was not prejudiced by the ruling. He says: "The indictment charged shooting, with intent to kill and murder. The verdict was 'guilty of shooting with intent to kill.' Taking the indictment and the verdict and construing them together, we are led irresistibly to the conclusion that the defendant was not affected by the refusal of the judge to grant the requested charges."

We understand the argument to be that the jury having, in point of fact, with the whole evidence before them, found the accused guilty of shooting with intent to kill, we are bound to presume that their verdict is justified by the law and the evidence, and therefore we must assume, even had the requested charge been given, it would have and could have brought about legally no change in the result. We understand it to be argued that even were the particu-

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lar verdicts asked for legally possible under some special state of facts, yet they were not possible under the actual facts of the case before the court, as is demonstrated by the verdict found. Therefore, even if there were error in refusing to inform the jury that a verdict of guilty of assault and battery or one of guilty of assault could be returned under an indictment of shooting with a dangerous weapon with intent to kill and murder, we would have before us a case of error without injury.

It is intimated that the verdict actually brought in is utterly irreconcilable with the idea that a mere knowledge on the part of the jury that under an indictment of "shooting with intent to kill and murder" a verdict could be brought in of "guilty of an assault," or "guilty of assault and battery," could or would have changed the situation. That to assume otherwise would be to assume that the jury had improperly, in order not to acquit the accused, been willing to punish the accused, and to bring in a verdict not justified by the law and the evidence, and this we can not do. We do not know what effect the refusal to charge may have had upon the jury, or what verdict the jury would have rendered had the requested charge been given. It may be that a verdict other than the one actually rendered would have been contrary to the law and the evidence, and the accused would have been called to receive a lighter punishment than he deserved under the law and the evidence, but had such a verdict been returned we would have been forced to accept it as correct. We are of the opinion that if the accused had the legal right to claim that the court should have charged as he requested, the mere fact that through that charge the jury might have been induced to unwarrantably and unjustifiably return a lighter verdict than the evidence would have justified would not warrant us in denying him the right of having the charge given, let the result before the jury be what it might.

We are called on, therefore, to examine whether the court was justified in refusing to give the charges asked. No reasons are assigned for the refusal.

Our attention is called by defendant to State vs. Ford, 30 An. 313. CHIEF JUSTICE MANNING in that case said *arguendo* that "upon an indictment for an assault with a dangerous weapon or with intent to kill there may be a conviction for an assault. The reason is that these offences belong to the same class; the same kind of evidence

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is applicable to the one as to the other. They differ in degree and not in kind. If the evidence is insufficient to warrant a conviction for the offence of greater magnitude it may support a conviction for that of lesser magnitude, and judgment upon such a verdict has long been allowed under the modern criminal law."

In *State vs. Price*, 45 An. 1431, defendant was prosecuted for the "crime of striking a person with a dangerous weapon, to-wit: a club, while lying in wait with intent to kill and murder." Accused asked the judge to charge, among other requested charges, that a verdict might be found under Sec. 796 of the Revised Statutes. Section 796 declared "that whoever shall be guilty of assaulting and beating, wounding short of maiming, or of falsely imprisoning any person, shall, on conviction thereof, suffer a fine or imprisonment, or both, at the discretion of the court." The District Court refused this charge, and on this point this court said: "As to Sec. 796 the indictment includes and sufficiently charges an assault and battery, and the defendant was entitled to have the jury charged that they could return a verdict under that section."

In *Bishop's Criminal Law*, Vol. 1, par. 895, we find it laid down as supported by authority that "one under an indictment for an assault with an intent to commit murder may be convicted of a simple assault or a compound assault of a less degree than that alleged."

In *Bryant vs. State*, 41 Ark. 359, it was held that under an indictment for an assault with a deadly weapon with intent to commit upon the person of another a bodily injury, etc., the accused might be convicted of a simple assault.

In the *American and English Encyclopedia of Law*, verbo "Assault," p. 782 (Note), we find that "on an indictment for an assault occasioning actual bodily harm and charging in other counts an unlawful wounding and the infliction of grievous bodily harm, a conviction may be had for a common assault. *R. vs. Yeadon*, 1 L. & C. 85." "And this, notwithstanding the word 'assault' does not occur in the indictment. "*R. vs. Taylor*, L. R. 1, C. C. 194; 38 L. J. M. C. 106."

In the case at bar the word "assault" does not "occur" but the word "shoot" does. Had the accused been found guilty of shooting a particular person with a dangerous weapon, a pistol, commonly called a revolver, with intent to kill and murder him, there would have been embodied in that conviction a finding that he had been

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guilty of "an assault," and also guilty of "an assault and battery," for a battery is not necessarily a forcible striking with the hand or stick or the like, but includes every touching or laying hold (however trifling) of another person or his clothes in an angry, revengeful, rude, insolent or hostile manner. A man, for instance, throwing a bottle or a stone at another, and hitting him, is guilty of battery. (Am. and English Encyclopedia of Law, *verbo* "Battery," p. 783); Hill vs. State, 63 Georgia, 578.

The defendant's contention is that if this be the case then it follows (under the doctrine laid down in the law writers) that "where one is indicted for any offence he may be convicted of one of less magnitude, provided it be of the generic class," that the District Court erred in not charging as requested.

This does not necessarily follow, for in dealing with this question we have to keep steadily in view the precise indictment under which the accused was charged; the specific crime which was set out, and the language in which the charge was couched. If the indictment be for a statutory crime, the essential element of which consists, under the terms of the statute, in doing an injury in a particular way, that essential fact will have to be found necessarily present in any verdict which the jury may return for a subordinate or minor crime under the indictment, in order to justify the verdict. Section 791 of the Revised Statutes declares that "whoever shall shoot, stab or thrust any person with a dangerous weapon, with intent to commit murder, shall, on conviction, suffer imprisonment at hard labor or otherwise for not less than one nor more than twenty-one years."

Now a person may either "shoot" another with a dangerous weapon, with intent to murder, or, he may "stab" him with a dangerous weapon with intent to murder, or he may "thrust" him with a dangerous weapon with intent to murder. If he "shoots" a person with a dangerous weapon with intent to murder and an indictment were brought against him, so laying the crime, evidence would not be allowable on the trial to show that the party accused had "stabbed" a person with a dangerous weapon, or that he had "thrust" a person with a dangerous weapon with intent to murder. The District Attorney would have to make his proof conform to the allegations. The question of "shooting," of "stabbing" or of "thrusting" would not be here "mere matter of evidence" going only to show the par-

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ticular manner in which the injury was brought about, or giving details of the same to the jury, but they would be questions entering into the very essence under the statute of the crime charged, and a failure by the State to prove the fact of "shooting" or "shooting at" (if the charge was "shooting") or "stabbing" (if it was "stabbing"), or "thrusting" (if it was "thrusting"), would be fatal to the prosecution. A verdict of guilty of "assault," or guilty of "assault and battery" under an indictment for "shooting a person with a dangerous weapon with intent to murder," under evidence that the person charged had struck another with a stick, would be clearly illegal, and if such a verdict under such circumstances would be illegal the possibility of such a verdict having been rendered under such circumstances would make such a verdict an improper one.

If we had a statute making the "shooting" of a person by another with a dangerous weapon without further details a crime, and one making the "shooting at" one person by another with a dangerous weapon, a crime without further details, the "shooting" of the person would be unquestionably an "assault and battery" and the "shooting at," an assault, and a jury would, under an indictment of "shooting with a dangerous weapon with intent to murder" be permitted to find a verdict of "shooting with a dangerous weapon," which would be an "assault and battery" or "shooting at" with a dangerous weapon, which would be an "assault," but it would not be permitted to return a general verdict of "guilty of an assault and battery," or "guilty of an assault," for the verdict would then enter into the regions of uncertainty as to what the "assault and battery" or the "assault" consisted in, and whether the accused was guilty of the specific crime charged or any of the specific minor offences under it which would be justifiable under the law.

The views we here express are, substantially those announced in *State vs. Murdock*, 35 An. 729, and *State vs. Pratt*, 10 An. 191. We are of the opinion that the court properly refused to give the charges asked.

The judgment being, in our opinion, correct, it is hereby affirmed.

No. 12,181.

STEWART BROS. & Co. vs. G. H. SUTTON.

When a party sells the homestead for an existing debt as the price, and immediately the purchaser transfers it back to the vendor and takes a mortgage and vendor's lien on the property, the transaction will be viewed as one of mortgage to secure the debt, and in violation of Art. 222 of the Constitution.

A PPEAL from the Seventh Judicial District Court for the Parish of East Carroll. *Montgomery, J.*

Jos. E. Ransdell for Plaintiffs, Appellants.

Clifton F. Davis and *Thorpe & Barber* for Defendant, Appellee.

Argued and submitted June 2, 1896.

Opinion handed down June 15, 1896.

The opinion of the court was delivered by

MCENERY, J. This suit was instituted to subject certain immovable property of defendant to sale, to satisfy a mortgage debt. The defendant sets up a homestead claim on the property. There was judgment, recognizing the homestead right of defendant on part of the property, and a personal judgment against him for the amount of the debt, subjecting the property, not allowed as a homestead, to the mortgage.

Plaintiffs have appealed.

The facts are that the defendant was a member of the firm of Sutton & McNeil, which firm owed plaintiffs the sum of one thousand six hundred and eighty-one dollars and ninety-two cents. The defendant wanted additional advances. The plaintiffs refused to advance unless the defendant would first settle the Sutton & McNeil debt. He offered to mortgage the homestead. This proposition was declined by plaintiffs. A sale was agreed upon and it was executed, the price being the Sutton & McNeil debt. The plaintiffs then resold the property to defendant, retaining a mortgage and vendor's lien for the price, which was divided into instalments. The plaintiffs are pursuing the defendant on these mortgage notes.

State ex rel. Thibaut vs. Judge.

The case is different from that of *Henkel vs. Mix*, 38 An. 271, relied upon by plaintiffs. In that case the sale was not intended to operate as a mortgage to secure a debt, but it was a sale with delivery and a faculty of redemption.

In this case the vendor remained in possession of the property, and it was resold to him and a mortgage retained for the price: the debt due by Sutton & McNeil to the plaintiffs. The sale to plaintiffs and the resale to defendant were for the purpose of subjecting the property to mortgage to secure the debt. It was done for the purpose of evading Article 222 of the Constitution, which prohibits the mortgage of the homestead; except for certain purposes mentioned in the article. "The right to sell any property which shall be recorded as a homestead shall be preserved." This means a *bona fide* sale, not one resorted to for the purpose of securing an existing indebtedness. The language in the opinion in the case referred to is applicable here:

"If it were true that the parties intended the contract to be one of mortgage, but they or one of them put it in form of a sale to evade the prohibition of mortgaging the homestead, we would give effect to the intention and let the party who tried to evade the law take the consequences."

The entire transaction was to secure the debt due by Sutton & McNeil, and was hypothecal in character. *Colvin vs. Woodward*, 41 An. 630.

There was a stipulation in the act of mortgage for ten per cent. as attorney's fees. The mortgage in the judgment appealed from, operates on the property, not covered by the homestead act. The judgment is amended so as to allow ten per cent. attorney's fees, as stipulated in the act of mortgage.

The judgment as thus amended is affirmed, applicants to pay the costs of appeal.

No. 12,194.

STATE EX REL. C. V. THIBAUT VS. ROBERT HINGLE, JUDGE OF THE
TWENTY-SECOND JUDICIAL DISTRICT COURT.

Act 129 of 1877 was repealed by Act No. 40 of 1890. The latter act does not authorize a judge to enter an order of recusation in chambers.

ON APPLICATION for Writs of *Mandamus* and *Prohibition*.

State ex rel. Thibaut vs. Judge.

James Wilkinson for Relator.

E. H. McCaleb and *John Dymond, Jr.*, for Respondents.

Submitted on briefs June 6, 1896.

Opinion handed down June 15, 1896.

The opinion of the court was delivered by

MCENERY, J. This is an application for a *mandamus* to compel the respondent judge to recuse himself.

The grounds alleged are that James Wilkinson has contested the election of the respondent judge, and that said suit is pending; that the relator has filed a suit against Frank C. Meyers, contesting his title and right to the office of sheriff of the parish of Plaquemines, and that the respondent judge's "mind would be certainly warped and biased in said cause in favor of the said Meyers too much to give plaintiff a fair trial in said cause."

He further alleges that at the time of making said application for the recusation of respondent he overlooked the provisions of Act 129 of E. S. of 1877, which applies to the transfer of contested election cases.

The respondent judge answers that: (1) Act 72 of 1884 grants to all courts a delay of thirty days within which to pass upon any case submitted to the courts for action; (2) there is no law authorizing the court to grant the order of recusation in chambers, and that Act 40 of 1880 repeals the Act 129 of 1877, and the former act is the only one regulating the mode and manner of recusation.

Act 129 of 1877 was enacted to carry out the provision of the Constitution of 1868, which says that when the judge is personally interested in the suit he shall call upon the parish or district judge, as the case may be, to try the case.

The preamble to the act is that there is no provision by legislative enactment made for the trial of cases where the judge is personally interested, and the judge to whom the case is referred is recused. The act provides for the trial of contested election cases in which a person claims to have been elected to, or contests the right of any person to hold an office. Under the act the District Judge must be

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interested in the case, and this is a condition precedent to its transfer to the nearest District Judge. But we are of the opinion that Act 129 of 1877 can not stand and be enforced, and it is repealed by Act 40 of 1880.

The Constitution of 1879 replaced that of 1868, and not a vestige of it was left as a part of the organic law. A new judiciary system was adopted. Courts were abolished, others established, and jurisdiction territorially and in amounts were different from what they had been under the Constitution of 1868. Article 112 of the Constitution made a change in the law relating to the recusation of judges and the trial of recused cases. It says "the General Assembly shall provide by law for the trial of recused cases in the district courts by the selection of licensed attorneys at law, by an interchange of judges, or otherwise."

The Act 129 of 1877 was repealed by Act 40 of 1880. In the reorganization of the judicial system, by the Constitution of 1879, Art. 112 says the General Assembly shall provide by law for the trial of recused cases in the district courts by the selection of licensed attorneys at law, by interchange of judges, or otherwise." By every rule of construction, when the Legislature passed an act to carry out this provision of the Constitution it was exclusive of any other mode of recusation by former laws, unless they should be continued in force and in no way conflicting with the same.

There is no exception as to any particular class of recused cases and they must be tried by licensed attorneys or an interchange of judges, or otherwise.

Act No. 40 of 1880 was passed to carry out this article.

Section 3 of the act says in cases in which the district judge is recused for cause of interest, he shall for the trial thereof appoint some district judge of an adjoining district, which order shall be entered upon the minutes of the court. No provision is made for the issuing of the order of recusation in chambers. It must therefore be made in open court, as the order has to be entered upon the minutes, after which it is made the duty of the clerk to make a certified copy of the order from the minutes, under seal of the court, and forward them to the sheriff of the judge's residence, or to the place in which the judge may be, to be served on him. An inspection of the two acts will at once convince that they are inconsistent and can not stand together.

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Act 72 of 1884 does not apply to orders of recusation. Its purpose is to compel the decision of a case within thirty days in order to avoid delay. The general purport of the act to have cases specially tried would be defeated in recused cases if the judge were allowed thirty days to deliberate whether or not he should recuse himself. The order of recusation should be issued as early as practicable.

We understand from the answer of the respondent judge that he has not refused to recuse himself, but has declined to do so in chambers.

The relief prayed for is denied and the orders herein issued revoked and the rule discharged.

No. 12,105.**MRS. M. M. FISHER VS. BOARD OF SCHOOL DIRECTORS.**

Paragraph 4, Sec. 1 of Act No. 136, 1894, is null and void, being in conflict with constitutional amendment proposed by joint resolution 110 of 1890, and Act 36 of same session, enacted to carry out the provisions of the amendment.

The amendment gave the Legislature authority to dispose of the surplus of the one per cent. tax allowed by said amendment, and Act 36 having disposed of a part of it for the support and maintenance of the public schools of New Orleans, it became a vested right in the Board of School Directors, which can not be disturbed by subsequent legislation.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

Louque & Pomés for Plaintiff, Appellant.

Horace L. Dufour, Assistant City Attorney, for Defendant, Appellee.

Branch K. Miller for Intervenor, Board of Liquidation of the City Debt, Appellee.

Argued and submitted April 25, 1896.

Opinion handed down May 4, 1896.

Rehearing refused June 1, 1896.

Fisher vs. Board of School Directors.

The opinion of the court was delivered by

McENERY, J. The plaintiff alleges that she is the owner of school certificates aggregating in value the sum of seven thousand five hundred and forty-seven dollars and eighty-one cents, and prays that the Board of Directors of the city schools of the city of New Orleans be condemned to pay her said amount out of the school tax levied by the city of New Orleans prior to 1879, and out of the surplus bond fund levied by the city of New Orleans under Act 136 of 1894. The Board of Liquidation of the city of New Orleans intervened in the suit, but its intervention was dismissed. There was judgment rendered in behalf of plaintiff for the sum of five thousand one hundred and forty dollars and thirty-one cents, with legal interest from judicial demand, payable in due course, out of the school tax levied by the city of New Orleans prior to the year 1879. In all other respects the demand of the plaintiff was rejected.

There was no demand made against the city of New Orleans, and the city is in no way liable for the amount sued for by plaintiff; the intervention was therefore properly dismissed.

The certificates owned by plaintiff were issued subsequent to the year 1872, and prior to January, 1879. Their *status* has been fixed by the decrees of this court. *Labatt vs. City of New Orleans*, 38 An. 283; *Fisher vs. School Board*, 44 An. 184; *Gasquet vs. School Directors*, 45 An. 342.

"They are payable only out of the revenues of the years for which they were issued, and only when said revenues are collected and in the manner therein provided."

The plaintiff contends that by Act 136 of 1894, she is entitled to be paid out of the surplus bond taxes levied by the city of New Orleans. We do not think that said act, in any way, changed the *status* of plaintiff's claims, as fixed by the decrees in the cases heretofore referred to.

Joint Resolution No. 110, of session 1890, proposing an amendment to the Constitution, which was adopted, provides that after paying annual interest on constitutional bonds, and bonds not retired, and the payment of the allotment of premium bonds and premiums extant in the fund at such time and of such amount as the Legislature prescribes, the surplus of the one per cent. tax employed for the above purpose shall be disposed of as prescribed by the Legislature.

State ex rel. Davis vs. Judges.

Act No. 36 in the same year was passed to carry out the amendment, if adopted, and in the amendment Act 36 is approved and confirmed, in all its parts, as a contract between the city of New Orleans and the holders of bonds. There is no right of any bondholder involved in this controversy, but the act was to follow the amendment and become a part of it, so far as the subject matter referred to in the amendment is to be explained or interpreted, or rights acquired under it are affected. Section 8 of the act, referring to the surplus of the one mill tax, devotes one-half of it to a permanent public improvement fund; the other half of said surplus shall be paid over to the school board of the city of New Orleans, to be used in the maintenance and support of the public schools in said city.

The amendment gave the power to the Legislature to dispose of the surplus of the one per cent. tax. Under the power thus given and simultaneously with the adoption of the amendment, it disposed of the one-half one per cent. tax to the school directors of the city of New Orleans, for the support and maintenance of the public schools of New Orleans. This disposition of the surplus tax can not be diverted from its destination by subsequent legislation. Paragraph 4, of Sec. 1, Act 136 of 1894, is in conflict with Act 36 of 1890, which, so far as the disposition of the one-half of the surplus one per cent. tax is involved, is, in fact, a part of the amendment proposed by joint resolution 110 of 1894, and adopted.

Judgment affirmed.

MILLER, J., recused.

No. 12,175.

STATE OF LOUISIANA EX REL. ISIDORE H. DAVIS VS. THE JUDGES
OF THE COURT OF APPEALS, FIRST CIRCUIT.

Under Article 108 of the Constitution, the Court of Appeals must allow three judicial days in which applications for rehearings may be filed in accordance with Act 18 of 1879.

ON APPLICATION for a Writ of *Mandamus*.

Ben. P. Edwards and J. A. Dormon for Relator.

State ex rel. Davis vs. Judges.

J. W. Holbert for Respondents.

Submitted on briefs June 5, 1896.

Opinion handed down June 15, 1896.

ON APPLICATION FOR WRIT OF MANDAMUS.

The opinion of the court was delivered by

MCENERY, J. This is an application for a *mandamus* in the exercise of the supervisory jurisdiction of this court to compel the respondent judges to allow an application for a rehearing, to be filed in case of *Epstein, Rosenberg & Co. vs. I. H. Davis*, and other cases, against the relator. The cases were decided July 12, 1895, and the Circuit Court of Appeals adjourned July 13, 1895. The next regular term of the court convened February 10, 1896, and on the 11th the relator filed an application for a rehearing. The court declined to consider it on the ground that the application was filed too late.

The only question presented is whether the relator was entitled to three judicial days in which to file his application. A judicial day is distinguished from a legal day in this, the former means a day in which the court is in session, and the legal day is one in which legal and judicial business can be transacted, as distinguished from *dies non*.

The Court of Appeals was in error in confounding the judicial and legal day.

The Court of Appeals was established by the Constitution of 1879.

Prior to the establishment of the court, Act No. 18 of 1879 was passed, making judgments rendered by the Supreme Court final after six judicial days in the city of New Orleans, and three judicial days in the country parishes where sessions were held.

Article 103 of the Constitution of 1879 provides that the rules of practice regulating appeals to and proceedings in the Supreme Court, shall apply to appeals and proceedings in the Court of Appeals, so far as they may be applicable, until otherwise provided by law.

It was the practice in this court, when this article was enacted, to allow three judicial days within which applicants for rehearings at the country terms could file their applications. It was a legal right

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conferred by law. Under the above article of the Constitution, it became a rule of practice, a legal right conferred on all litigants in the Court of Appeals. It is urged that the abolishment of the country terms of the Supreme Court destroyed the practice of allowing three judicial days for applications for rehearings, and as it no longer exists as a rule of practice in the Supreme Court, the rule is also abolished as to the Court of Appeals. There is no force in this reasoning. The terms of the Court of Appeals were not abolished. It was an existing right when the Court of Appeals was established, and it can only be destroyed by legislative enactment changing the practice in that court.

The relief prayed for is granted and the *mandamus* made peremptory.

No. 12,170.

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SHREVEPORT ROD AND GUN CLUB ET AL. VS. BOARD OF COMMISSIONERS CADDO LEVEE DISTRICT ET ALS.

If a conveyance of immovable property, under a resolution of the board of directors of the corporation, the vendor, accepting the offer to buy, is assailed by parties claiming they were the purchasers intended by the resolution, and were deprived of the property by the fraudulent substitution of those to whom the conveyance was made, it is competent for such parties holding the title by competent deed to show by testimony that the conveyance was in pursuance of their offer to buy, accepted by the board, and thus the conveyance accorded with the resolution; such testimony not infringing on the prohibition of parol to create or destroy title to immovable property.

The principle that to avoid the sale for lesion the inadequacy of price must be clearly proved, is applied in this case. Civil Code, Art. 2689; 12 Martin, 421; 5 La. 382.

APPEAL from the First Judicial District Court for the Parish of Caddo. *Land, J.*

Leonard & Randolph for Plaintiffs, Appellants.

Wise & Herndon for Commissioners, Defendants, Appellees; *T. F. Bell* for Shreveport Gun Club and *W. B. Jacobs and Associates*, Defendants, Appellants.

Argued and submitted June 3, 1896.

Opinion handed down June 15, 1896.

Rod and Gun Club et al. vs. Board of Commissioners et als.

The opinion of the court was delivered by

MILLER, J. This suit is for property claimed under an alleged sale of the Caddo Levee Board, the Shreveport Rod and Gun Club, plaintiff, and another organization, the Shreveport Gun Club, each claiming under that sale, and the board denying it made any sale.

It appears that a proposition was made to the Levee Board by W. B. Jacobs, S. J. Enders, W. B. Jenkins and Mr. Wells for the purchase of the property, and the board accepted the offer by a resolution referring to the proposition as coming from the Gun Club. This was followed by the sale, by authentic act, to Mr. Jacobs and his associates, Enders, Jenkins and Penick, for the price paid them. Soon after these purchasers, with others, organized a corporation under the name of the Shreveport Gun Club, and to this club the purchasers from the board sold the property, the president of the board ratifying the sale. An unincorporated association, under the name of the Shreveport Rod and Gun Club had existed in Shreveport for years, with a large membership, including Jacobs and Enders, two of the purchasers of the land. The contention of the plaintiff is, that as this unincorporated gun club was the only organization bearing that name in existence when the board accepted the offer to buy of the "Gun Club," therefore that club was intended and merged as is this unincorporated gun club into the corporation now plaintiff, that the plaintiff is entitled to the land.

The Levee Board, originally one of the defendants, finding itself confronted by two claimants each contending for the property under the resolution for a sale to the Gun Club, concluded to dispute the pretensions of both. In this connection it may be stated the board had an agent for the sale of its land, and we gather from the testimony he had been spoken to by various parties, those who became purchasers and others, in reference to the sale of this property. It was by this agent the offer from the Jacobs party came before the board. We gather the first offer was lower than the price—eleven cents per acre—for which the land was afterward sold. At the first meeting, the board dealing with the offer from the Jacobs party, referred it to the committee and adopted a resolution that all sales should be ratified by the board; then, on August 20, after receiving the committee's report, came the resolution accepting the offer of the Gun Club, ten cents for eleven thousand acres, and the sale to the Jacobs party followed. On the 19th of September, 1895, the

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president of the board ratified the sale of the land by the Jacobs party to the incorporated club, and the action of the board closes with a resolution of the 20th September, 1895, in instructing the board's attorneys to (take proceedings) annual the title given to the Jacobs party. In this condition, the intervention was filed in the pending litigation between the Shreveport Rod and Gun Club *et als.* against the levee board, the Shreveport Gun Club *et als.*

The pleadings on the part of the plaintiff, the Shreveport Rod and Gun Club, in substance, assert title under the resolution of the board accepting the offer of the Gun Club; attacks the title of the Jacobs party, derived from the board and the ratification by the president as not authorized and *ultra vires*; and prays the board be decreed to convey title to the plaintiff. The intervention charges the board, ignorant of the value of the land, was imposed upon; that sold for eleven hundred dollars, the property worth five thousand dollars, and prays that the sale be avoided for lesion, or the purchasers be condemned to pay the difference between the alleged value and price, and along with this the board alleges that the sale was not authorized to the purchasers. The resolution of the lower court was in favor of the board, and, as stated, the case is here on the appeals of the clubs.

The title of the Shreveport Gun Club being assailed as not authorized by the Levee Board, and hence a fraud on the rights of the other club, the plaintiff, the record contains a mass of testimony offered by the defendant club to show that the sale was made to those who made the offer accepted by the board and intended by the resolution. To all this testimony the plaintiff objected. A large portion of the discussion in the plaintiff's brief is devoted to this objection. The argument for the plaintiff is on the theory that its own title is exhibited by the resolution of the board, accepting the offer of the Gun Club, the proof of the unincorporated association of that name and that no other club bore it, supplemented by testimony that the membership of the plaintiff corporation is composed of those or some of them belonging to the Gun Club. On this supposed basis of title, the theory of the plaintiff is, that the resolution for the sale to the Gun Club precludes any proof to ascertain from whom came the offer to buy in order to fix those intended by the resolution of acceptance. The argument supposes that all such testimony infringes on the prohibition of parol to affect that title the plaintiff

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conceives it exhibits. In view of the parol necessarily administered by plaintiff the objection is forcibly suggested it might be made by the other club holding the title by authentic act. Civil Code, Art. 2275; *Shepherd vs. Percy*, 4 Martin, 275; *Heiss vs. Cronan*, 12 An. 213; *Bradford vs. Cook*, 4 An. 229. But, in our view, the resolution of the board accepting the offer to buy is not the title. Nor is there any sanctity attached to the resolution of a corporate body using the terms "the Gun Club," without other designation, that precludes proof of the parties intended. The tendency of the testimony was to show the offer came from Mr. Jacobs and his party, and that they proposed to form a gun club. There is no marked inconsistency, if any, between the resolution and the testimony. Resolutions are not usually framed with technical accuracy, and the framer might well use the terms "The Gun Club" to denote individuals proposing such organization, and in no point of view it seems to us, can there be any objection to testimony explanatory of a resolution offered to show the parties making the offer accepted as coming from the Gun Club. Then again, the allegation in plaintiff's petition substantially is, that the property designed to be sold to the Gun Club was fraudulently conveyed to Jacobs and his party. When the title of a party is thus assailed, it is surely competent for him to meet the issue by proof there was no such diversion, but that the offer, the acceptance and the resolution all indicated [those to whom the conveyance was actually made. The ruling of the court admitting the testimony was entirely correct.

The argument for the defendant attacks the capacity of the Shreveport Gun Club to acquire property because the number of corporators required by law did not concur in the organization (Act No. 112 of 1888). It is also contended that the resolution proposing a sale to the club, there was no power in Mr. Jacobs and his party, termed in the brief the promoters of the organization, to bind it, hence the conclusion is deduced that there was no contracting party to buy. Finally, it is claimed there was no sale because it was not ratified. If the sale to Mr. Jacobs and his party is maintained, it is immaterial to whom, whether a corporation or an individual they conveyed, for the first conveyance disposed of the property. The other objection that supposes there was no contracting party answered, we think, by the fact that the vendor alone was concerned on that point. The board sold to parties who did bind them-

selves and paid the price. The sale by the board itself required no ratification. The ratification required by the resolution on that subject referred to sales by the agent, the natural import of ratification.

We have thus considered the objections urged by the plaintiff to the testimony supporting the title of the defendant club. We have given attention to the plaintiff's argument impugning the contract by which the board sold and contesting the capacity of the Shreveport Gun Club. But of what pertinence is the discussion in the brief of plaintiff on these points, if it exhibits no title from the Levee Board? The petition assails the title of the defendant club. The preliminary contention for the plaintiff is to show title in itself. Until that burden is discharged the plaintiff can not call in question the title of the other. What then is the proof adduced by plaintiff to support its pretensions? It is the resolution of the board, the proof of the existence and membership of the Gun Club when the resolution of acceptance was adopted. But no conveyance. On the defendant's argument there can be no further testimony, save and except, that which it conceives is essential to show the relation between the Gun Club and the plaintiff corporation. Thus, with no vestige of any conveyance to itself, the plaintiff seeks to overthrow that under which the defendant club holds the property for the price paid, stipulated in the deed. If the controversy is to be determined on the narrow lines maintained by plaintiff, then plaintiff stands solely on the resolution accepting the offer of the Gun Club, with the aid that can be deemed afforded by the very restricted testimony the argument indicates. On the other hand the defendant club presents itself with the legal title by authentic act, first to the Jacobs party and by them to the defendant. The first conveyance is executed the day the resolution is passed, full of significance of the intention of the resolution and carrying the presumption of conformity of the resolution and the deed. In that condition of the record it is difficult to perceive the basis of the judgment the plaintiff seeks.

The defendant club with the legal title needs no testimony except to repel an attack. But in our view the testimony produced confirms the conveyance to the defendant. It is shown the offer to buy was made through the land agent of the board by Mr. Jacobs, Enders and Wells; it was considered, referred, and after the com-

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mittee had visited the land and reported the resolution of acceptance was adopted. There is no suggestion, as we read this record, of any other offer before the board. There is no ground to attribute any agency in the matter for the Gun Club, if, indeed, any such mandate under the stern exaction of our law on the subject could be shown by any evidence in plaintiff's hands. True, we gather from the record there was an idea of some of the members of the Gun Club the purchase was proposed for that club. There seems to have been expressions from the purchasers, apt, perhaps, to produce that impression. But nothing of this nature in this record could possibly furnish that basis exacted by our law to decree the ownership of immovable property. It is stated in the plaintiff's brief that the agent testified he made the offer for the Gun Club, but in another part of the testimony he testifies he does not know whether or not the offer was made for the unincorporated club, or for what club it was made. It is quite certain from the testimony that the proposition came from those to whom the land was conveyed, and Mr. Jacobs testifies he stated to the agent he proposed to buy for the Gun Club to be formed. From first to last in the testimony we find no trace of any agency or trust or substitution of any contract when another was intended. The current of proof is that the Jacobs party negotiated for themselves, and took the title in pursuance of that purpose. We concur in the opinion of the lower court there is no title in plaintiff. In our view the defendant has exhibited title, and it must be maintained, unless the contention of the Levee Board is maintained.

We have considered the ground of lesion alleged by the Levee Board. It is suggested that in this respect there is an inconsistency with the other issue made by intervention, but waiving that, the testimony does not, in our view, sustain the alleged lesion. The price paid was one thousand one hundred dollars. Lesion supposes fraud on the vendor. Inferred as is the fraud from inadequacy of price, that disproportion the law exacts shall be clearly established. Civil Code, Art. 2589 *et seq.*; *Bossier et al. vs. Vienne et al.*, 12 Martin, 421; *Riviere vs. Boissiere*, 5 La. 382. The land in this case was subject to overflow, the resort of sportsmen, and its purchase seems to have been sought for hunting purposes. We gather from the record the suggestion of a disputed title, an element for consideration, but its force, the record does not enable us to estimate. *Copley vs.*

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Flint & Cox, 16 La. 380. Irrespective of that, if the land had any value except as a hunting ground, it seems to have been purely speculative. There are in the record some valuations of this character on which, in our view, no judgment could rest avoiding the sale. There is testimony tending to show a fair price was paid, and a witness for the defendant, familiar with the land, testifies he would have bought for any price. We have no indication of the testimony relied on to sustain the alleged inadequacy of price, and our examination of the testimony leads to the same conclusion as that of the lower court, that the contention of the board on this point fails.

The lower court admitting all the testimony, holding that no offer came from the Gun Club, but did come and was accepted, from Mr. Jacobs and his associates, and rejecting the plaintiff's demand, yet reached the conclusion that the sale should be annulled. As we appreciate the opinion, it holds the resolution proposed a sale to a club, not to individuals; that no proof was admissible to substitute the purchasers for a gun club, therefore the sale to Jacobs and his associates was not authorized; that all sales were to be ratified, and that this sale was never ratified, but repudiated by the board. In this case there is a sale by the corporation in pursuance of the resolution accepting the offer. It can not, in our opinion, be maintained that the corporation could dispute such a sale upon the ground, the sale should have been to a gun club. Nor do we think, if any controversy arose after that sale was executed in reference to the purchasers intended, there could be any objection to testimony that the proposition considered and accepted by the board came from the parties to whom the title was conveyed. At the meeting when this offer was made through the land agent, there was a proposition to abolish the land agency, and at a later period a resolution passed, requiring all sales to be ratified by the board. We think it is forcibly suggested the ratification proposed referred to sales by the agent. Ratification in its usual sense refers to the action of a principal approving the act of another for the principal. We think that sense must, in this case, be attributed to the ratification required. The sale by the corporation, in pursuance of an acceptance by the board of directors, binds without ratification. We can not hold that the resolution, in this case, required the ratification of the corporate act, if indeed the sale itself, following the resolution accepting the offer, was not a ratification.

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The opinion lays stress on the fact that the character of the Shreveport Gun Club does not conform to the statute requiring twenty-five signatures. But if the conveyance to Mr. Jacobs and others divested the title of the board, it is of no concern to it, to whom the land was afterward conveyed. The board was to sell for cash and it has been paid. Without the slightest injury to itself, we can not appreciate the basis on which the board can expect to set aside the sale, on the ground the sale should have been to a club instead of to the individuals who made the offer, and afterward formed a club, the method of the organization of which is, in our view, of no moment to the board.

We have had no brief from the board, but have sought to accord attention to the grounds of the intervention and those presented in the oral argument, as well as to the opinion of the lower court, and our conclusion is, the sale must be maintained.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed in so far as it dismisses plaintiff's suit, and reversed in so far as it maintains the intervention and annuls the sale to W. B. Jacobs, S. J. Enders, A. F. Jenkins and W. S. Penick; and it is now ordered and decreed that the sale to them be and is hereby maintained, and the intervention be and is hereby dismissed with costs.

No. 12,179.

JACKSON HEFFNER ET ALS. VS. JAMES HEFFNER, EXECUTOR, ET ALS.

The requirement of the Code that the olographic will shall be dated, requires that the day of the month shall be stated; the day is part of the date, and the month and year, without the day of the month, avoids the olographic will. Civil Code, Art. 1588; Napoleon Code, Art. 970; 4 Boilleux, 91; 3 Troplong, par. 1479; Coin Delisle, pp. 151-542; Lagrave vs. Merle, 5 An. 278; Fuentes vs. Gaines, 25 An. pp. 85-107.

A PPEAL from the First Judicial District Court for the Parish of Caddo. *Land, J.*

Harrison & Aston and D. T. Land for Plaintiffs, Appellees.

Wise & Herndon for Defendants, Appellants.

Argued and submitted June 5, 1896.

Opinion handed down June 15, 1896.

The opinion of the court was delivered by

MILLER, J. This appeal is from the judgment of the lower court annulling the will, olographic in form, of William Heffner, rendered in the suit of his collateral heirs seeking to set it aside. The ground of attack sustained by the judgment was that the will has no date. Omitting its dispositions the will is in this form :

“State of Louisiana,

“Caddo parish,

“Written

dated and signed in my own handwriting, on this day of June, 1893.

“WILLIAM HEFFNER.”

The Code defines the olographic will to be that written, dated and signed by the testator himself. The date, signature and the entirety of the will in the handwriting of the testator are the essentials. C. C., Art. 1588. The testament in this form carries none of the guarantees the law provides in respect to wills in the other forms prescribed by the Code, to prevent forgeries. The nuncupative will by public act is written by the public officer, appointed by law for the purpose; is attested by him and the witnesses, as the expression of the testator's wishes, dictated to the notary and signed by the testator. The nuncupative will under private signature requires witnesses and the fulfilment of other conditions required by law, to entitle such papers to credit as acts of last will. Civil Code, Arts. 1578, 1581, 1584, *et seq.* When the Code comes to prescribe the olographic testament, the notary, the witnesses and all forms of authentication are dispensed with, and the requirement is that such a will to have validity must be wholly written, dated and signed by the hand of the testator. The policy of the law to secure the true representation of the testator's wishes and guard against fraudulent wills is marked in the requisite of the testator's handwriting, including the expression of the date when he writes the paper and affixes the signature it bears. The date in the testator's handwriting is part of the evidence the law requires of the verity of the instrument. If the paper is forged, the date it must bear may furnish the means of detection. On any issue of the sanity of the testator

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the dates indicate and restrict the period of inquiry. There are other reasons suggested by the French authorities, all enforcing the date of the olographic will as indispensable to its validity. Napoleon Code, Art. 970; 3 Troplong, par. 1479; Coin Delisle, 542.

The date in its ordinary sense imports the day of the month, the month and the year. That is also the legal significance of the date. The day of the month is quite as much a part of the date as the month or the year. If the law requires the olographic will to be dated, the exaction extends to every part of the date. The argument to sustain this will insists with great force that on the basis of reason the will should not be held void, because of the omission of the day, readily admitting of the proof tendered and excluded by the lower court. In support of this view we are referred to the frequent use of testimony for supplying omissions in deeds, and common law authorities are cited to show that the omitted date of a will may be proved. But these authorities under a different system of law, can yield no aid in this discussion of a question, in our view, controlled by our Code. The mandate of the Code is positive, without and purposely without, any qualification or exception. The will must be dated and the month, without the day, is no date. The hardship of the case has prompted us, in the absence of any direct adjudication of our own courts on the point, to examine the views of the French commentators, dealing with the corresponding article of the Napoleon Code. They disclose the reason of the law in exacting the date, and maintain the day of the month to be essential. We find the distinction drawn by them between a wrong date, which it seems has been held will not vitiate, and no date or a deficient date, which will avoid the will. But the necessity of the day of the month in the date of the olographic testament is rigidly enforced by the jurisprudence under the Napoleon Code (see authorities cited and Paillet Manuel de droit Français notes on Art. 970 N. C. In our own reports the Pena case (Pena vs. New Orleans, 13 An. 86), and the case of Fuentes vs. Gaines, 25 An. 85-107, are pertinent.

That the olographic will must be entirely written, dated and signed by the testator necessarily excludes proof *aliunde* of the essentials. The only evidence is the will itself. The testimony tendered to supply the deficiency in the will was properly excluded by the lower court.

The judgment of the lower court is, therefore, affirmed with costs.

Insurance Co. vs. McLain.

No. 12,182.

THE MECHANICS AND TRADERS' INSURANCE COMPANY vs. L. D.
McLAIN.

When a party has been induced to make a payment of money for a consideration the withdrawing or withholding that consideration entitles the party making the payment to a return of his money.

A PPEAL from the Fifth Judicial District Court for the Parish
of Ouachita. *Potts, J.*

Stubbs & Russell for Plaintiff, Appellee.

E. T. Lamkin for Defendant, Appellant.

Argued and submitted June 1, 1896.

Opinion handed down June 15, 1896.

The opinion of the court was delivered by

MILLER, J. The plaintiff sues to recover the amount of insurance premiums collected by its agent, the defendant, and he reconvening claims damages for the alleged withdrawal of his agency. The judgment of the lower court recognized defendant's liability for the commissions, allowed him part of the damages claimed, and for the difference in plaintiff's favor, rendered judgment, from which both parties appeal.

It seems that prior to July, 1893, the plaintiff had an agent in Monroe, conducting their insurance business; he had an arrangement with the defendant by which the agent only, was to be known in the business, but in point of fact, defendant was interested, or, as the agreement expresses it, owned the business, the ownership not to be disclosed, the agent to be solely responsible for all collections, receiving a stipulated portion of the commissions and profits. This arrangement was not known to plaintiff when their agency was created, but became known when their agent fell in arrears. In this condition plaintiff determined to change their agent and selected the defendant. The negotiation that resulted in the selection is detailed in the testimony of the plaintiff's secretary and the defendant, and it was conducted with

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knowledge of the plaintiff of the connection of their former agent with the defendant who was to take the agency. The defendant testifies in effect, that the proposition of plaintiff to him was that he should assume the debt of the former agent, in consideration of which the insurance agency should be transferred to him; that he told the secretary it would take two or three years before the defendant's commissions would refund him the debt he was to assume, and that estimate as to time, he testifies, was the result of the discussion between them, and with that understanding, the defendant testifies, he accepted the agency. The secretary, testifying on the same point, states there may have been some figuring as to the time required to refund defendant in commissions the indebtedness of the former agent; that would not, the witness adds, imply a continuous agency, nor would the plaintiff consider any such indefinite agency. He further testifies, he never asked that the defendant should assume the indebtedness of the former agent; it may have been a stipulation that he assume the balance on giving him the agency; and while in the course of the testimony of the secretary there are expressions that might be deemed to negative the contract alleged by defendant, still, in answering the question put to him on the subject, we find the expression of the witness' belief that the transfer of the agency was in consideration of the assumption of the former agent's debt, and in consideration of defendant's employment of the former agent. In view of the fact, the secretary conducted the intercourse to which his belief refers; his form of expression carries great force, and does not seem materially to differ from the testimony of the defendant. Following this intercourse between the secretary and the defendant, he was appointed agent, paid the debt, amounting to one thousand six hundred and seventy-eight dollars and seventeen cents, the consideration, he testifies, of the transfer to him, and it is beyond dispute that within a short time after the plaintiff withdrew the agency, the commissions received, on which he testifies he was to rely for reimbursement, not then exceeding six hundred and fifty dollars, as against his outlay of near seventeen hundred dollars.

The amount of premiums collected in the period defendant was permitted to hold the agency, and for which the suit is brought, admits of no dispute. The contention is as to the reconventional demand that defendant is entitled to be reimbursed the amount paid plaintiff on the faith, he claims, of getting the agency, and for damages for its withdrawal.

We can appreciate the testimony of the secretary in reference to a continuous agency. It is natural no principal would favorably consider an agency to endure for all time, or indeed for any time, without that control consistent with the contract that principals usually retain. In this case it is manifest, the plaintiffs were seeking to secure from defendant the assumption and payment of the debt of the former agent, the loss of which might have been apprehended, and it is, we think, clear that the promise was held out by implication, at least, that if the defendant would pay the debt he should have the agency and its commissions as a means of reimbursement. An agency to be withdrawn at once would, of course, not be desirable, and it is quite certain the debt of seventeen hundred dollars was paid on the faith of the agency and its commissions. An examination of the testimony leads us to the conclusion that the agreement contemplated the retention of the agency by defendant until his outlay to obtain the appointment was returned to him in commissions. We do not find in the secretary's testimony relating to the negotiation with defendant any material difference with the testimony of defendant. We have his positive testimony that was the agreement, and indeed he testifies that a longer duration of his agency was contemplated. In aid of his testimony we have the significance of the payment of the debt, quite natural on the theory of the agreement, but in any other aspect quite out of the usual course. The conclusion is forced on us that the withdrawal of the agency within the brief period after the plaintiffs secured the payment from defendant, violated the agreement and carried the obligation of indemnity to the defendant.

We have given consideration to the ground on which it is claimed plaintiff is to incur no liability. It is insisted defendant was bound for the debt he paid and can claim no reimbursement. This refers to the arrangement of the former agent and defendant under which he owned the insurance business conducted in the name of the former agent. If the plaintiff, with no knowledge of that arrangement, dealing always with their former agent as occupying that relation, conceived they could hold the defendant, it was their option to seek the enforcement of that liability. If, instead, they preferred to avoid the hazards of litigation and secure payment by promising to the defendant the agency with its commissions for that payment, and thus induced it, the plaintiffs can not now take the position they did not

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choose to take at first. They had full knowledge while their negotiations with defendant, as we understand the secretary's testimony, of the relation of defendant with their former agent, and the obligation arising out of their agreement can not, in our view, be defeated, because they now conceive and seek to urge the absence of basis for their engagement on the faith of which they obtained payment from defendant.

The defendant earnestly contends that besides reimbursement he is entitled to damages. We are referred to a case reported in the *Insurance Law Journal* in which it seems to have been held that probable profits would be allowed not as a measure of damages, but to aid the jury in their estimate of the damages to be awarded an insurance agent wrongfully removed. Our law is, we think, more rigid on this subject than is implied in this extract. Our courts, in this class of cases, are bound by the proof. We can see our way clear to give the plaintiff the indemnity of compelling plaintiff to make him whole for the money he paid not returned in earned commissions. This was the solution of the lower court, and we find no basis in the record to change the judgment, which is therefore affirmed with costs.

No. 12,129.

NATURALIZATION OF THEODORE OSTHOFF.

THEODORE OSTHOFF VS. A. V. FLOTTE, CLERK—MANDAMUS.

The provisions in Act No. 123 of 1890 that the clerk of the Civil District Court shall furnish copies of naturalization papers free of cost, when the originals are lost, is not repealed by the section of the Act No. 186 of same session (the fee bill) fixing the charge for copies furnished by the clerk. The fee bill is general in its operation and without effect to repeal the special legislation on this subject in the earlier act. Civil Code, Art. 28; 12 An. 498; 39 An. 513; and 9 An. 329.

The court applies our settled jurisprudence that the requirement of the Constitution, that the title of the act shall express its object, is to be understood in a reasonable sense, and holds that the system of registration of voters includes, as an incident, the method of obtaining naturalization certificates; hence the provision that copies of such certificates, to enable the voter to register, shall be furnished by the clerk free of charge, is fairly within the title of the Act No. 123 of 1890, to provide the mode of registration of voters, etc. Const., Art. 29; 6 An. 805; 39 An. 329.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Naturalization of Osthoff vs. Flotte, Clerk.

Rogers & Dodds for Plaintiff, Appellee.

Denégre, Blair & Denégre for Defendant, Appellant.

Argued and submitted on briefs, June 6, 1896.

Opinion handed down June 15, 1896.

The opinion of the court was delivered by

MILLER, J. This is an application for a *mandamus* to compel the clerk of the Civil District Court to issue, without charge, a copy of the naturalization papers of the relator, and the appeal is by the clerk, from a judgment making peremptory the *mandamus*.

The relator's reliance is on the 32d section of Act No. 123, p. 164, of 1880, which required the clerk to issue the copy on the application of the party, and without charge. The clerk bases his refusal on the subsequent Act No. 136 of 1880 authorizing the clerk to charge for copies generally.

The title of the Act No. 123 of 1880 is to provide a system of registration. It is minute in its provisions to secure a correct registration, refers to certificates of naturalization to be produced as evidence of the right to register, and to this end requires copies to be furnished by the clerk when the originals are lost, and that no charge shall be made. It is contended the title to this act does not cover the subject of the 32d section in reference to the furnishing of these copies. We think the method of registry, that the purpose of the act was to direct, would have been imperfect without providing for obtaining the naturalization certificates, the evidences of citizenship, and the direction for copies without cost was within the scope of the title as an incident of the subject of the act. Const., Art. 29; Municipality No. 3 vs. Michoud, 6 An. 305; Succession of Lanzetti, 9 An. 329; Succession of Aaron, 11 An. 671.

The other contention of the defendant is that the 32d section of Act No. 123 of 1880 is repealed by the Act No. 136 of 1880, the fee bill. The charge for copies generally, authorized by that act, is, in our view, not inconsistent with the special legislation in the previous act. A general rule prescribed by a later statute is not accepted as manifesting any purpose to disturb the previously

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enacted special rule. In our view Sec. 82 of the Act 123 of 1880 is still in force, and hence the relator is entitled to the copy without charge. Civil Code, Art. 23; Succession of Fletcher, 12 An. 498; State vs. Slave Kitty, 12 An. 805; State vs. Labatut, 39 An. 513.

The judgment of the District Court is therefore affirmed with costs.

No. 12,188.

SUCCESSION OF MRS. W. JUSTUS.

Ordinarily the entries in registers duly made, kept by one bound to record the fact in a foreign country, makes proof when authenticated by the consular officer at the place.

The certificates were of birth, marriage and death, and as such were admissible in evidence.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Dinkelspiel & Hart and Buck, Walshe & Buck for Executor,
Appellee.

Chrétien & Suthon for Defendant in Rule, Appellant.

Submitted on briefs June 22, 1896.

Opinion handed down June 23, 1896.

The opinion of the court was delivered by

BREAUX, J. This case was remanded to enable the parties interested to prove that there are no minor heirs.

At the trial, certificates of the curate, Reider, were admitted as proof of the fact that there were no minors, Armbruster.

On appeal it was urged by appellant's counsel that these certificates were offered without having first submitted them for their inspection, and without having given them an opportunity to disprove or explain them.

The appellant further urged that she desired to purchase the property free of all clouds upon the title, and that the case should be remanded to allow the explanation, by testimony, of the family tree of the Armbruster family.

Succession of Justus.

After the case had been remanded to the Civil District Court, the purchaser obtained a commission to take the testimony of the curate who had given the certificates in question.

It was executed in due time and returned.

The curate of a church in Wolfach, Germany, was the witness examined under commission.

He testifies that he kept the register of births, baptisms, marriages and deaths of his church.

He was directed by the question propounded to examine the certificate he had issued on the 28th day of February, 1893, and referred to on the trial of the case as certificate A, and state whether all the facts therein contained were taken from the register of his church or not.

He answered yes. He explains how the information was obtained, showing that these certificates are correct. There is nothing about these certificates, or the statement of this witness, that suggests, in the most remote manner, that they are not absolutely true. The entries were made by one who had authority to make them.

The inquiry heretofore was particularly directed to Anton Armbruster, and as to whether he left minor children.

The family tree shows that he was father of two children, Maria and Karl; the former was born in 1855 and the latter in 1857. Neither is married. Of these facts, we judge that the evidence is entirely sufficient. From the register, duly kept, the names, date of birth, and other needful facts are given with ample particulars to prove that there are no minors who can be interested in the title.

The United States Consul at Kehl, Germany, certifies that G. Reider, whose name is subscribed as a witness in answer to interrogatories propounded, was parochial clergyman at Wolfach.

The certificates, admitted in addition, show the marriage and death of the parents of Joseph Armbruster, the testator in question; the birth of each child and the death certificate of such as died, showing that at his death he had no minor brothers and sisters.

With reference to Anton Armbruster, in our decision remanding the case, we said, *inter alia*:

"The executor of the estate, Mrs. Justus, applied for a rehearing on the ground that Anton Armbruster lived more than five years after the date of the judgment of 24th of November, 1876, probating the will of Joseph Armbruster, and, in consequence, prescription at his death was a bar to any informality of the will."

Railroad Co. vs. Levee Commissioners.

On the last trial, which resulted in a judgment from which this appeal was taken, a certificate properly admitted in evidence shows that he, Anton Armbruster, died 20th October, 1882. It is therefore abundantly proven that the five years in question had elapsed. He was the father of Maria and Karl, mentioned above. They, Maria and Karl, were not concerned in the estate of their uncle, Joseph Armbruster, during the existence of their father, Anton Armbruster, who lived, as we have just seen, more than five years after the will of his brother Joseph had been probated.

In our former opinion, Succession of Justus, 47 An. 306, we said: "In order that she may purchase the property free from all clouds upon the title, she desires that the case be remanded, to allow the explanation by testimony of the family tree and the curate's certificate."

The explanation by testimony was had, and we think it proves the verity of the "family tree and the curate's certificate."

As to the family tree, it appears that the registry was in conformity with the rules of the registering church; the whole community being interested in their truth and preservation, it imports verity upon its face.

It was not a private writing, the object of interest to but few. Best on Evidence.

In our judgment, the title tendered is one that the defendant in rule should accept.

It is ordered, adjudged and decreed that the judgment appealed from is affirmed at appellant's costs.

No. 12,160.

NEW ORLEANS & CARROLLTON RAILROAD COMPANY VS. BOARD OF
LEVEE COMMISSIONERS OF ORLEANS LEVEE DISTRICT.

Plaintiff proved up its title. The maps introduced in evidence do not impeach the validity of the title, or lessen the value placed on the property expropriated. The defendant having admitted that the property was plaintiff's, and having fixed a value without deduction for a street, is decreed indebted for the whole property, without reference to the street.

The grant of a right to extend tracks through certain designated streets can not be construed into an intended indemnification for property expropriated by the Levee Board.

The evidence of the witnesses sustains the correctness of the judgment appealed from as to the value of the property.

The party cast in the suit owes the cost.

Railroad Co. vs. Levee Commissioners.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Ambrose Smith and John M. Bonner for Plaintiff, Appellee.

Bernard McCloskey for Defendant, Appellant.

Argued and submitted May 23, 1896.

Opinion handed down June 1, 1896.

Rehearing refused June 25, 1896.

The opinion of the court was delivered by

BREAU, J. The Board of Commissioners of the Orleans Levee District, under authority of law, appropriated property known as the Carrollton Railroad Depot at the same time that it appropriated the property of a number of other persons, upon which it built and constructed a levee.

In 1892 a statute was enacted by the General Assembly authorizing the defendant board to levy a special tax in order to indemnify those whose property had been thus appropriated; the statute provided that the amount to be paid each owner should not exceed the assessed value at the time it was appropriated.

This suit was brought to recover the alleged value of the property, and to that end the plaintiff alleges that since more than fifty years they are the owners, and in proof produced title.

The defendant urges that plaintiff is without right, for the reason that the map in evidence shows that the greater part of the buildings upon defendant's property was standing within the limits of the public streets.

In the second place, the defendant avers that the plaintiff has already received compensation for the expropriated property, and lastly defendant contends that the property is not in value equal to the amount claimed.

Evidence to prove the value of the property was admitted. The assessment roll shows that the year the property was expropriated it was assessed at the amount now claimed by the plaintiff.

The judgment of the District Court was for plaintiff, in the sum

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of sixteen thousand six hundred and twenty dollars, and condemned the plaintiff to pay costs.

From the judgment the defendant prosecutes this appeal.

In the answer to the appeal the plaintiff prays that the judgment in its favor be increased to the amount claimed in its petition, subject to a credit of eleven hundred dollars; and that costs be paid by the defendant.

Returning to the fifth question—the ownership of the property—the evidence shows that it was bought by the plaintiff in 1838, and that the title was duly recorded. This is not disputed by the defendant. The defence is limited to the maps, *i. e.*, as to their effect as evidence, showing, the defendant argues, that part of the property was a public street prior to and at the date of the appropriation.

The maps were offered by plaintiff to show the *locus in quo*. The whole property was assessed as the property of the plaintiff. These maps are not translatives of title; nor do they, without the aid of any other evidence whatever, make proof of expropriation. All the witnesses agree in the statement that all the property of defendant, at the point already stated, was appropriated by the Levee Board, in order to construct thereon part of a new levee. In fixing the value no reference was made to any claim the city had to any part of the property as a street. The plaintiff was, in so far as the record shows, the undisputed owner of the property.

Moreover, there was a meeting called of all those whose names were on the assessment rolls to come before the Special Committee of the defendant corporation to obtain title from them and fix the values of the different properties.

At the instance of the defendant the value of the property of plaintiff was fixed at seventeen thousand seven hundred and twenty dollars; nothing was said before that committee of a street running over any part of the property.

It is true that the claim of the defendant railroad company was rejected, and no amount was allowed by the defendant, but the rejection was not on the ground that it did not own the property.

The principal point on which the defence rests is the value of a franchise granted by the city of New Orleans to the plaintiff some time after the defendant had made the appropriation before mentioned. It is urged that the value is equal to the amount plaintiff

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can claim as indemnity, and that the former (the grant of the franchise) should be considered a fair compensation for the expropriation. In the preamble of the grant it is stated the depot of the New Orleans & Carrollton Railroad Company has been appropriated and destroyed by the Levee Board of the parish of Orleans for the construction of the new protection levee.

In the ordinance following the preamble no mention is made of indemnity. The ordinance is a mere grant of franchise without any reference to indemnity intended or to any consideration whatever. In the absence of any expression in the text upon the subject we would not be justified in assuming that it was the intention of the City Council to grant a franchise as an indemnity for an appropriation. The two corporations are separate and distinct. Their functions are not the same. The former has naught to do with the appropriations of the latter.

Another depot and workshops were needed by plaintiffs. They bought the site some seven or eight squares from the expropriated depot. Access to this property was essential. The right of way was given through certain named streets. Several causes may have moved the Council to make this grant.

There were contractual obligations between the city and the plaintiff entered into with the view of benefit to each. The former was interested in the successful operation of the road. It is not for us to determine, in the absence of an expression upon the subject, what motive prompted the Council, or that the Council, by a grant of franchise, intended an indemnity to the defendant.

The *quantum* of indemnity presents the next question. The appellant insists that the amount claimed is excessive, while the appellee prays for an amendment of the judgment and an increase to the amount claimed in the petition.

The witnesses greatly differ in regard to the value of the property. The assessment was considerably higher than it had been the previous year, owing, it seems, to the increase in the value of property in the locality.

Despite the increase in value, some of the witnesses thought that it was a high assessment; others estimated its value at considerably less. The weight of the evidence, we think, sustains the value placed upon it by the defendant. It serves as a basis for the judg-

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ment of the District Court. We agree with the conclusion arrived at by the learned judge of that court as to that amount. The property of the old depot remaining to the plaintiff was valued at eleven hundred dollars. This, we think, should be deducted from the value of the whole property. To that extent the defendant is entitled to credit on the amount due for indemnity; it was part of the depot property valued which was not essential in building the new levee.

With reference to the cost: It was not disputed in oral argument; costs are due by the one cast. There are no special statutes exempting the defendant from the effect of the textual provisions of Art. 549 of the Code of Practice. In this respect, also, the judgment is amended.

It is ordered and adjudged that the judgment appealed from be amended by condemning the defendant to pay the costs of suit in the District Court.

As amended the judgment is affirmed.

Costs of appeal to be paid by the appellee.

 No. 12,021.

**THE VICKSBURG, SHREVEPORT & PACIFIC RAILROAD COMPANY VS.
THE MAYOR AND CITY COUNCIL OF MONROE.**

The clause in the charter of the city of Monroe "to fix the squaring and to prevent any encroachments upon or the stopping and obstructing the streets" * * * gave to that city the right to pass the ordinance to cause the removal of obstacles from the public streets; but the right of a person who denies the legality of the exercise of that power, in respect to a particular locality, to apply to the courts for the purpose of judicially testing whether it fell under the operation of the power, is equally clear.

The claim that an expropriation of land for railroad purposes by a particular railroad necessarily carries with it, as an immediate and direct consequence, the right of a city or parish to build or carry a street across it without expense of any kind to itself, and without judicial proceedings, is not tenable; certainly not, in the absence of a statute, or of the railway company holding its charter subject to such a right.

ON REHEARING.

BREAUX, J. The defendant having acted within its delegated powers is bound by its compromise, at least until annulled in a direct action.

A PPEAL from the Fifth Judicial District Court for the Parish of Ouachita. *Potts, J.*

48	1102
49	879
48	1102
111	89
111	124

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Stubbs & Russell for Plaintiff, Appellee.

Thos. O. Benton, City Attorney, for Defendants, Appellants.

Argued and submitted January 22, 1896.

Opinion handed down February 10, 1896.

Oral argument on application for rehearing June 1, 1896.

Rehearing refused June 15, 1896.

Plaintiff alleges that in the year 1858 it acquired for depot and railroad purposes the tract of land formerly belonging to the heirs of E. N. Wilson, in and near the town of Monroe—that it was acquired by purchase and duly recorded.

That in the year 1859-60 it acquired for a valuable consideration from Dr. John Calderwood and wife a strip of land one hundred and fifty feet wide through the tract of land immediately adjoining the Wilson tract below and on the south thereof—that same, however, was acquired by the original Vicksburg, Shreveport & Texas Railroad Company, which constructed its railroad and tracks thereon in the year 1859-60, and that same has been operated ever since, save an interval during the war.

The petitioner had, by purchase, succeeded to all the rights of the Vicksburg, Shreveport & Texas Railroad Company, and had made extensive and valuable additions to the tracks and works. That for the proper and safe use of its property, whose large machine shops and numerous tracks have been made, and to prevent trespassers from its yards and tracks where they have no right, and to prevent accidents and injury to persons so trespassing, the plaintiff had enclosed on either side its shop and track yard for its own protection and that of the public.

That pretending that two several streets of the town crossed the tracks and yard of the company, to-wit: the streets known as Grammont and Wood, had been closed by plaintiff, the Mayor and City Council of Monroe had ordered and threatened the removal of said fence on what they claim is Grammont and Wood streets; that said removal would be made and a consequent trespass on the rights and property of petitioner which would work irreparable damage to

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it, which if estimated in money would be over twenty-one hundred dollars besides the expenses and costs of the proceeding then instituted.

On the prayer of plaintiff an injunction issued restraining the Mayor and City Council of Monroe from committing the trespass threatened, and that they be required not to interfere with or remove the fence constructed by petitioner for the protection of its yards, shops, machinery and tracks in the town of Monroe from Sixth street to the crossing of Oak street by plaintiff's line of road as now fixed.

Defendants answered, pleading first a general denial. They admitted the repeal of Ordinance No. 588 (closing Grammont street), approved March 2, 1885, and the adoption of the preamble and resolutions to Ordinance No. 843, approved February 4, 1895, ordering plaintiff to remove obstructions to Grammont and Wood streets.

They averred that said preamble, resolution and ordinance were adopted in strict accordance with the powers and rights of the Mayor and City Council of Monroe, as fixed by the charter of said city and the amendments thereto. They denied that plaintiffs or their assignor "acquired from Dr. John Calderwood and wife a strip of land one hundred and fifty feet wide through the tract of land immediately adjoining the Wilson tract below and on the south thereof." They averred that by judgment of the Supreme Court in the suit of the Vicksburg, Shreveport & Texas Railroad Company vs. John Calderwood, No. 794 on the docket of said court, rendered on the 23d of July, 1860, a strip of one hundred feet wide through the above mentioned tract of land was expropriated to the use of the above railroad company; and that said strip of land is held by plaintiff subject to all the restrictions and provisions of law applicable to lands expropriated for public use and benefit. They averred that Grammont street and its extension to beyond Young's Bayou was used as a free thoroughfare and road before the Vicksburg, Shreveport & Texas Railroad was built or incorporated; that said street and road was located on the Calderwood or Hart tract and on that of the Wilson or Railroad tract. That the Railroad and Hart addition to the town of Monroe was surveyed and laid off by G. Y. Dabney, Superintendent and Chief Engineer of the North Louisiana & Texas Railroad in the year 1870, and the map of said

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addition was filed in the Recorder's office of the parish of Ouachita, and paraphed "Ne Varietur" on the 12th of January, 1871.*

That by said survey and the filing of said map, and by divers acts on the sale of property and recognition of said map, the said Gram-

* Ordinance No. 588 referred to is as follows:

"An ordinance declaring Grammont street where it is crossed by the tracks of the V. S. & P. R. Company closed against public travel as a thoroughfare whenever the said railroad company shall have opened Grammont street into Eighth, properly ditched, graded and otherwise prepared for public uses, and shall have properly opened, ditched and graded a street running north from a point where Oak street intersects with the main track of the V. S. & P. Railroad to Grammont street, and shall have opened, ditched and graded a street running north from Grammont street to Elysian street. The opening, ditching and grading of said streets to be done at the expense of said railroad company, and the closing of said Grammont street, by the operation hereof, at said point being declared to enure to the public convenience and interest of the city.

"Be it ordained by the Mayor and City Council of Monroe, That Grammont street, where it is crossed by the tracks of the V. S. & P. R. Co., be and the same is hereby declared closed against public travel as a thoroughfare; provided, that the V. S. & P. R. Co. shall open Grammont street into Eighth street, properly ditched, graded, and otherwise prepared for public uses, and provided said company shall open, ditch and grade a street running north from a point where Oak street intersects with the main track of said railroad, and thence to Grammont street, and provided said company shall open, ditch and grade a street running from Grammont street to Elysian street; said work herein imposed on said company to be done within a period to be fixed by the Mayor and to be notified by him to the company—official notice of the passage of this ordinance to be made—and provided further, that all expense for the purchase of the property to open the streets which said company is herein required to open is to be borne by it, also all cost of ditching and grading the same, and provided further, that the work contemplated under the provisions of this ordinance be done to the entire satisfaction of the Mayor.

"Be it further ordained, That the closing of said street at said point when accomplished by compliance on the part of said railroad company with the obligations herein imposed on them is hereby declared to enure to the public benefit, convenience and interest of the city."

This ordinance is declared to have been adopted in 1885.

Ordinance No. 843 and the preamble and resolutions attached to it, also referred to in the pleadings, are as follows:

"Whereas, V. S. & P. R. Co. have continued for years openly and persistently to avoid, fail and refuse to comply with the obligation entered into by them which induced the Mayor and City Council to provisionally close Grammont street as a thoroughfare where it crosses the tracks of said railroad company; and

"Whereas, in disregard and contempt of the protests and demands of said Mayor and City Council the said company has inclosed both Grammont and Wood streets, and thus cut off all communication north and south of said tracks from Desiard to Oak. Therefore be it

"Resolved, That the Mayor be and he is hereby authorized to notify the officers of said V. S. & P. R. Co. that Ordinance No. 588, approved March 5, 1885, has been this day repealed, and further to order said railroad company to remove all obstructions now existing which will in any way interfere with the free use of Grammont street and of Wood street, where said streets cross the track of said railroad, to remove the fence from the sidewalks of Grammont street on the north of said railroad line, and to notify said company that if said obstructions are not removed within ten days they will be removed by the police force at the costs of said railroad company."

Approved February 4, 1896.

ORDINANCE NO. 843,

Repealing Ordinance No. 588, Approved March 2, 1885.

SECTION 1. Be it ordained by the Mayor and City Council of the city of Monroe in regular session convened, That Ordinance No. 588, approved March 2, 1885, entitled "An ordinance declaring Grammont street where it crosses by the track of the V. S. & P. Railway Company closed against public traffic as a thoroughfare" is hereby repealed.

SEC. 2. Be it further ordained, etc., That this ordinance shall take effect from and after its passage.

Approved February 4, 1896.

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mont street, from its intersection with Hall street to the eastern limits of the town and city of Monroe, was dedicated to the public use and became one of the streets of said town and city of Monroe. They averred that Wood street, from Young's Bayou, the eastern boundary of the city, to the Vicksburg, Shreveport & Pacific Railroad, has been regularly and legally dedicated to the public use as one of the streets of the city of Monroe. They averred that petitioner's property, the Vicksburg, Shreveport & Pacific Railway, is a public highway under the Constitution and laws of the State of Louisiana, and as such plaintiffs are totally without power to obstruct or prevent free ingress or egress from any public road or street to or from the right of way of said railroad or highway. They averred that Wood street was dedicated to public use as a street of the city of Monroe, from the right of way of said North Louisiana & Texas Railroad (now Vicksburg, Shreveport & Pacific Railroad) to the eastern limits of the city, by the filing in the Recorder's office of the parish of Ouachita the map of Delery's addition to the city of Monroe, in 1871, and by other acts ratifying said dedication. They averred that they had been specially damaged by the injunction obtained by the plaintiffs in the sum of five hundred dollars as attorney's fees, and in the further sum of two thousand dollars by the illegal interruption of travel on the streets of the city by the costs incurred, by bringing the authority of the city in contempt and otherwise.

The District Court gave judgment in favor of the plaintiff, perpetuating the injunction, and the defendants appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. We find in the record a correspondence between parties representing the railroad company and the city authorities of Monroe, just prior to the passage of Ordinance No. 588, declaring Grammont street closed. On November, 1884, F. Y. Dabney, chief engineer and superintendent, wrote a letter to the mayor and City Council that he was in receipt of information which justified him in the belief that Grammont street, from the freight depot as then located to the vicinity of the Hebrew cemetery, was a part of the original property of the road and had never been alienated, and that it would be a grievous burden upon the company to keep that street

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open at all times in view of the numerous tracks that were designed to cross it. He further stated that it was his duty to inform them that unless it could be shown that the company had no rights in the premises, the company would be forced to close said street at such points as it crossed its tracks.

John Scott, vice president and general manager of the railroad company, also wrote to the Mayor and Council. He stated to them that he had been advised that the street claimed by some of the citizens of Monroe to exist through the railroad's yard, being an extension of Grammont street as laid out on some of the maps, had been used by the public only by sufferance of the railroad temporarily while there was no necessity to prevent such use. That he had lately become aware that a different view of the public right was entertained by some of the inhabitants of Monroe, and that, in deference to their wishes, the council had deemed it just, and had felt constrained to demand, that said alleged street be and remain unobstructed until and unless it could be judicially determined that no such public streets exist as a matter of right. That the company would therefore find it necessary, to protect itself from any injury and damage so large as to be wholly disproportionate to the public inconvenience involved, to enter into a litigation with the public through the Council; but believing that the Council in common with the citizens of Monroe generally would be willing to deal with the questions involved in a spirit of fairness, the company itself being reluctant to gain public ill will by insisting on its rights through the courts if the controversy could be otherwise settled to the mutual satisfaction of the parties concerned, it asked that the street in question be declared by a resolution of the Council to be henceforth vacated as a public street, permanently abandoned and closed. In consideration of such action the company proposed to pay the necessary expense of opening and making such other street or streets as would best contribute to the public convenience, as a substitute or substitutes for the one closed, to be designated by the Council and agreed upon as a condition to the closing of the street then asked for. The company suggested that the matter be at once considered, and the expense of opening a new street, so far as the acquisition of necessary lands was concerned, be ascertained, and that the resolution asked for be passed to take effect only upon the conditions to be therein stated. The company asked that in the meantime further action by the authori-

ties in respect to the proposed removal of alleged obstructions be temporarily suspended—the company also suspending any action on its part in respect to legal proceeding in the premises.

The passage by the Council of the Ordinance No. 588, closing Grammont street on the terms and conditions stated, followed shortly after, the ordinance obviously evincing a compromise between the parties relatively to their respective contentions and claims.

Shortly after the company purchased from Ferd. Cook and the heirs of Delery the lots and ground necessary to be acquired to enable it to make the necessary changes in the streets and opened a connection between Grammont and Eighth street. It also opened, ditched and graded Eleventh street from intersection with Oak street to Elysian street through the property purchased from the heirs of Delery and its own property.

Matters seem to have been satisfactorily adjusted between the company and the railroad from 1885 and 1886 up to within a short period prior to the passage of Ordinance No. 843, which repealed the Ordinance No. 588, by which Grammont street was declared closed, and notified the railroad to remove obstructions, declared to then exist interfering with the free use of Grammont street and of Wood street where said streets cross the tracks of the railroad, and to remove the fence from the sidewalks of Grammont street on the north of said railroad line.

The act which gave rise to this repealing ordinance seems to have been the placing by the company of a fence around a portion of its grounds, the fence closing the space covered by what the Council claimed to be the public street known as Grammont and closing East Wood street at its point of intersection with the railroad's right of way.

Counsel for the city says the legal questions presented to the court for consideration are:

1. Has the Mayor and city of Monroe the authority to cause the removal of obstacles from the streets of the city?

2. Are Grammont and Wood public streets of the city of Monroe by express or implied dedication?

3. Has a railroad company, after buying or having property donated to it by formal act with regard to its situation on a known and recognized street, the right to run a fence across that street and claim the street as its own property?

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4. Has a railroad company, after having expropriated land for its right of way, the right to build a fence cutting off a public street or road at its intersection or crossing of that right of way?

On the first point submitted counsel say: "The power of the Mayor and City Council, under the fifth section of its amended charter (Act No. 81 of 1871), is ample and complete with respect to the management and control of the streets, public roads, etc., of the city, to-wit: 'The Mayor and City Council shall have full power and authority to make and pass such laws as are necessary and proper. Ninth, to survey and lay out streets, to regulate and make improvements to the streets, public squares and other property, * * * to order and direct the ditching, filling, opening, widening and continuing any of the streets, * * * to determine the completion and pavements of the streets; to fix the squaring and prevent any encroachments upon or the stopping and obstructing of the streets * * * and to order any object, whatever may be its value, which may encumber the said places or prevent and embarrass the free use of the same to be removed or sold for whom it may concern in the same manner and after such advertisement as shall be required by ordinance.' "

The city complains that though it was specially authorized by its charter to cause the removal of obstacles from the public streets it has been restrained from doing so by injunction.

The right of the city of Monroe under its charter to cause the removal of obstructions from its public streets is unquestionable, but the right of a person who denies the legality of the exercise of that power in respect to a particular locality to apply to the courts for the purpose of judicially testing whether it fell under the operation of the power is equally clear. The city of Monroe and the plaintiff company were at issue as far back as 1885 as to whether the street known as Grammont street extended along or across the company grounds or not. Whether from a fear on both sides as to what would have been the result of litigation designed to settle that matter through the courts or from a spirit of mutual concession or self-interest, the fact remains that the parties adjusted their differences at that time in a manner satisfactory to both. They designedly withdrew from determination by the courts their respective claims and pretensions.

The circumstances of this case do not call for any investigation by

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us of the original rights of the parties in respect to Grammont street.

The ninth section of Act No. 81 of 1871 has been materially changed by an amendment to the same made by the fifth section of Act No. 81 of 1873. We quote so much of this last mentioned section (Sec. 5) as is necessary for our present purposes:

"Section 5. That the ninth paragraph of Sec. 9 of said aforementioned act to be so amended and re-enacted as to read as follows:

"Ninth—To survey and lay out streets, to regulate and make improvements to the streets * * * to order and direct the ditching, filling, opening, widening and continuing of any of the streets; and if for the above or other public purposes the land of any private person or body corporate is necessary to be had, to purchase the same at a reasonable price or cause the same to be expropriated according to the mode and formalities prescribed by existing laws upon the subject; to close and sell to any parties any street, alleys or real estate donated to the city for the use thereof in cases in which such closing and sale would enure to the public convenience and interests of said corporation." The action of the City Council in enacting Ordinance 588 of 1885 was obviously grounded upon this section of the law of 1873, as the recitals of the ordinance show. It declares that the closing of the street when accomplished by compliance on the part of the railroad company with the obligations imposed on them therein would enure to the public benefit, convenience and interest of the city.

The Council was authorized to pass the ordinance.

The city contends that the company has failed to comply with its obligations under the ordinance, and, therefore, it has a right to ignore it and proceed as if it had not been passed. We note the fact that the closing of the street was conditioned upon compliance by the railroad company with its obligations, but we think that as a matter of fact the company has complied with them; not only this, but the city has taken possession of Eleventh street over the property purchased by the company to be used as a substituted street and dealt with it as such. It is not claimed that that street or its use passed to the city otherwise than under the act of compromise—it has not been expropriated nor has it been dedicated to the public except through and by the terms of the compromise between the parties. We are of the opinion that the act of agreement stands between the city (one of the parties to the act) and its course as in

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form and manner it has undertaken to presently proceed. Railroad Co. vs. Jacobs, 44 An. 922.

The city in its brief says it "draws a distinction between Grammont street and Wood street from the fact that plaintiff claims the former street as being entirely located on its own property and denies the dedication, whereas the dedication of Wood street is indisputable and plaintiff can only resist the right of the city to open that street or keep it open to a portion of its right of way. Plaintiff claims in its petition for injunction that it *purchased* the strip on which its right of way is located from Dr. Calderwood and wife, but it has been shown this allegation is erroneous."

Referring to Wood street the brief says: "On all the maps which have been introduced in evidence in this suit, except the map of the Railroad and Hart's addition, Wood street is represented as running from the eastern limit of the city to and into the railroad right of way. The original map of Delery's addition filed in 1871 has been lost, but that map with all others showing special additions was embodied in the McLeran maps (filed in evidence) accepted by the city in 1874. Wood street never crossed the railroad right of way, as there is a portion of it west of the railroad which has never yet been expropriated by the city. But for twenty-four years it was open on the east side and recognized and used as a public street into the right of way, until it was fenced by plaintiff prior to the institution of this suit. Wood street enters the right of way on expropriated property. The expropriation was made for public use. Can the railroad now deprive the public of that use which they have had for more than twenty years, and deprive the property owners on Wood street of a servitude which they acquired when they purchased the property? Article 244 of the Constitution of 1879 declares that 'railways heretofore constructed or that hereafter may be constructed in this State are hereby declared public highways.' A way open to all the people is a highway. The exceptional feature of the instant case is that Wood street has never been opened across the right of way of plaintiff; an object which the City Council has in view in the immediate future. The facts of the case are these: At the point of intersection there is a space of at least forty feet on the east side of the right of way unoccupied by tracks. Diagonally across from Wood street, on the west side of the right of way and extending to it, is Extension alley, recognized in plaintiff's deeds and

map, and, therefore, persons passing to and from Wood street either went to the east, along the right of way to Oak street, or to the west to Desiard street, or else crossed the tracks and right of way to Extension alley."

The city of Monroe was incorporated by act of the General Assembly, approved March 14, 1820. It has been since greatly enlarged by successive additions to its territory of rural property in the neighborhood laid out into squares and streets by its owners, the property so laid out having been brought under the power and control of the city by subsequent acts of the Legislature (see Act No 102 of 1871, Act. No. 81 of 1878). Among these additions was one known as the "Delery addition." The map connected with that addition is stated to have been lost, but the property is not claimed to have been laid out by its owners prior to 1871. It was *dehors* the city limits long after the railroad company acquired its right of way, which was as far back as 1858 or 1860. Railroad vs. Calderwood, 15 An. 481.

We have found on the maps offered in evidence a street designated by the name of Wood or West Wood street. It commences at the Ouachita river and runs back into the city until it reaches Eighth street, which is a longitudinal street running more or less parallel to the river. East Wood street stops at Eighth street and directly opposite to Wood street, on the opposite side of Eighth is private property, which extends from Eighth to the railroad's right of way. To the right of West Wood street, going from the river, is Oak street, which, commencing at the river, crosses the railroad's right of way and extends beyond to the eastern limit of the city. The longitudinal streets are designated by numbers (though some of them are known also by special names)—the numbers running from two to eighteen or more; Second street being that nearest Ouachita river. The streets running back, or away from the river and nearest to West Wood street, are, first, Grammont street, which, starting at the Ouachita river, runs back to Eighth street; and next, on the left of Grammont street commencing at the river, is Desiard street, which crosses the railroad track, and extends to the eastern limits of the city. At a point on the line of Eighth street furthest from the river and about midway between where Wood and Oak streets strike Eighth street starts an alley about twenty feet wide, known as Extension alley, which runs back as far as the nearest line of plaintiff's right of way. Were West Wood street

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extended from Eighth to and over the plaintiff's right of way it would connect with a street known as East Wood street, claimed to have been dedicated to the public through the Delery addition in 1871 to the city. In making the plan of that addition the Delerys ran East Wood street to the right of way, but left open no longitudinal street along the right of way by which parties intending to pass to the front of the city could turn toward Oak street, and there cross the tracks. The side lines of the lots of the Delery property on East Wood street nearest the railroad ran directly up to and along the back line of the right of way. East Wood street was substantially a "*cul de sac*." The Delerys had no power to extend it over the right of way; they might deal with their own property, but certainly could not dispose of that of other persons. In the voluntary disposition of their own property they were at liberty to dedicate to the public just so much, or just so little as they thought proper. They were under no obligation to grant gratuitously a street along the railroad line of way from West Wood to Oak street. The city took what the Delerys gave and no more. It is under these conditions that the city claims that the placing by the railroad company of a fence along their line of road so as to bar entrance upon it from the way of East Wood street was an illegal interference with public rights and an unauthorized obstruction upon a public street. This contention is based upon the proposition that the railroad company did not hold its right of way by "purchase," but by an "expropriation for public use;" that the public use to which the property expropriated was thus thrown open was not limited to use for railroad purposes, but for all public purposes, and certainly for that of a highway for crossing purposes. The expropriation proceedings devoted the strip expropriated for railroad purposes for a full consideration paid for that right by the railroad company.

It is difficult to see how an outlay of the money of the company could be held to forcibly enure to the benefit of the city of Monroe. So far from property which has been appropriated to one public use being thereby *ipso facto* made applicable to all other public uses, it has been repeatedly questioned whether it could be made applicable at all for a different purpose than that for which it had been specifically expropriated. Lewis on Eminent Domain, Sec. 266, says that "a general authority to lay out highways and streets is sufficient to authorize a lay-out across the right of way of a railroad * * *

but under a general authority to lay out highways a part of the right of way can not be taken longitudinally, nor can the way be laid through the depot grounds, shops and the like, which are devoted to special uses in connection with the road and necessary to its operation and in constant use in connection therewith. But a slight interference with the platform of a depot will not prevent the establishment of a highway."

We do not undertake to discuss under what circumstances and to what extent the power of eminent domain over property already expropriated for one specific public use can be applied to make it serve another public purpose. Each case will have to be determined by its special circumstances. The authority cited is used by us as going to show that the city's claim that an expropriation of land for railroad purposes by a particular railroad necessarily carries with it as an immediate and direct consequence the right of a city or parish to build or carry a street across it without expense of any kind to itself, and without judicial proceedings, is not tenable; certainly not in the absence of a statute or of the company's holding its charter subject to such right.

In the case at bar the city has never attempted by expropriation proceeding to extend East Wood street across the railroad right of way over to Eighth street, where that West Wood street now terminates. In order to make the connection between East and West Wood street, not only would the city have to obtain a right of way across the railroad property, but it would have to expropriate a portion of the private property lying between the railroad, West Wood and Eighth street. It is idle to discuss now what the Council could or could not do under expropriation proceedings taken out under its power of opening and closing streets granted by the fifth section of Act No. 81 of 1873. It will be time enough to examine into that matter when an actual issue confronts us. No proceedings of that character have been instituted. As matters stand (and we are dealing with the parties from the present condition of things alone,) the city objects to the company's fencing in its right of way along its line of intersection with East Wood street as an interference with public rights and an obstruction upon a public street obviously under an asserted claim in the public to pass longitudinally along plaintiff's right of way from the head of East Wood street to Extension alley or Oak street. That right in the public does not in our

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opinion exist, simply by virtue of its having been left unenclosed and a portion of the public suffered to pass along it unopposed. The company was not forced to fence its right of way, but it had the right to do so, so long as the legal rights of others were not impaired. *Grossman vs. City of Oakland*, 41 Pac. 6. There has been no dedication by the company to the public of any portion of its right of way nor is there any description in this case. *New Orleans & Carrollton R. R. Co. vs. Carrollton*, 3 An. 285; *Torres vs. Falgoust*, 37 An. 500; *City of Shreveport vs. Drouin*, 41 An. 870; *Kansas City C. & S. Ry. Co. vs. Woolard*, 1 Mo., App. Rep. 258; *Am. Digest*, 1895, p. 2155, No. 24. We think the judgment correct and it is hereby affirmed.

ON APPLICATION FOR REHEARING.

BREAUX, J. We have carefully re-examined the issues in this case and have not found it possible, in law, to disturb the conditions accepted by all the parties to the compromise and executed many years ago.

We understand that the fences closing these streets run on the lines agreed upon between the plaintiff and the defendant in 1885—i. e., where the streets intersect the right of way, and indirectly affect the right of way. Other points and other streets, as to the right to close them, are not before us for decision.

We would not be justified in treating the ordinance as void. It must remain in force until decreed null in proceedings to that end.

It may be that the Council desiring to encourage plaintiff's enterprise has conceded more than it should have conceded; nevertheless the concession was made and has been accepted and the conditions complied with. It has become a *fait accompli*, which, under any view, is not void, and can not be absolutely ignored by the defendant as attempted by ordering the reopening of the street.

We have not held that a railroad company has the right to build a fence, cutting off a public street or road at its intersection or crossing, but we decided that it has authority to carry out a compromise with a municipal corporation and close a street in accordance with one of its ordinances looking to the closing of the street and the opening of another thoroughfare, in lieu of the thoroughfare closed. The power to close streets is delegated to the Council. There is no question here of eminent domain or of the exercise of that right; an undeniable right of those having the required interest for its exercise.

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The plaintiff has not made dedication of the street enclosed to public use.

If it had, the compromise would have the effect of putting an end to that use, at least until annulled in a direct action.

Municipal corporations have no power to pass ordinances transferring a privilege or right for an expressed consideration and afterward repeal them without granting to the transferees of the privilege or right the least hearing.

Our original decree remains undisturbed.

No. 12,115.

JOHN FITZPATRICK VS. THE DAILY STATES PUBLISHING COMPANY,
LIMITED, ET AL.

The authorities generally, English and American, hold the editor and publisher of a newspaper to the same rigid responsibility with any other person who makes injurious communications. Malice on his part is conclusively inferred if the communications are not true.

It is no defence that same have been copied with or without comment from another paper; or that the information upon which an editorial article is based was obtained from the columns of another paper. It is no defence that the source of information was stated at the time of publication, and that the editor or publisher believed it to be true. The freedom of speech and the liberty of the press were designed to secure constitutional immunity for the expression of opinion; but that does not mean unrestrained license, nor does it confer the right upon the editor and proprietor of a newspaper to write or publish whatever he may choose, no matter how false, malicious or injurious it may be, without full responsibility for the damage it may cause.

The modern rule with regard to the conditional privilege which newspaper publications enjoy is, that when the publication is made in good faith, in the ordinary course of the publisher's business, with good motives and for justifiable ends, and without any intention to work injury to the reputation or character of the subject of it, the party injured will be restricted in his recovery to actual damages; but the publisher is liable, not only for the estimated damages to credit and reputation, and such special damages as may appear, but also such damages, on account of injured feelings, as must, unavoidably, be inferred for the publication of such libel.

As the law looks to the *animus* of the proprietor in permitting his columns to be employed for the dissemination of calumny, circumstances may be shown in mitigation of damages.

The instigating circumstances pointed out by the defendants being, that the administration of the government of the city of New Orleans had become so notoriously corrupt that suspicion, in the public mind, rested alike upon all those in any way connected with it, and urgently demanded investigation and reform, they aver, that as faithful and fearless public journalists, they felt in duty bound to direct public attention to this serious condition of affairs; and, con-

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sequently, when Orlopp, an important city contractor, made the disclosures attributed to him in certain other city papers, they deemed it to be the discharge of public duty to make upon them the editorial comment that is complained of: *Held*, that while conceding the principle, the conclusion is denied, in the total absence of a plea of justification and proof of the truthfulness of the specifications in the article contained; for the law is just as studious to protect the reputation and character as it is the property of the citizen, and the public official from unnecessary, unseemly and unwarrantable aspersions upon the management and conduct of his office, through the columns of a newspaper.

While it is undoubtedly true that the preservation of good and pure government, either in city or State, greatly depends upon a free and fearless expression of public sentiment through the columns of the journals of the country, yet it is equally true that same must and can be accomplished through the instrumentality of cogent, temperate and well-reasoned editorials, predicated upon facts, and not by means of hasty, intemperate and opprobrious criticisms and abuse, having no other foundation than the current local items published in some other paper. This rule, if adhered to, will greatly tend to the promotion of truth, good morals and good government.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

E. A. O'Sullivan and George W. Flynn for Plaintiff, Appellee.

Gus A. Breauz for Defendant, Appellant.

Argued and submitted May 4, 1896.

Opinion handed down June 1, 1896.

The opinion of the court was delivered by

WATKINS, J. Plaintiff demands of the defendants *in solido* one hundred thousand dollars as damages for a libel upon him personally, and as Mayor of the city of New Orleans, charging the libel to consist of an editorial article which appeared in the issue of the *Daily States* of July 23, 1894, a newspaper owned and operated by the defendant company, and which was chiefly edited at the time by its co-defendant, H. J. Hearsey.

He alleges that said newspaper article was scurrilous, malicious, defamatory and libelous, and that in writing and publishing said article said defendants were actuated by malice and a desire to injure his reputation and character, as well as to deprive him of the esteem of the public, and to exclude him from intercourse with men of

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honesty, and to render him odious and detestable. That not only was that article inspired by hatred and malice, but it was absolutely false, and wholly without foundation in point of fact.

The answer of the defendants is a general denial, coupled with a special defence, the substance of which is as follows, to-wit:

That the article entitled "*A Den of Thieves*," which is alleged to have been libelous, was intended to and called the attention of the public to the corruption which it was the general belief then existed in the administration of the city government, and with a view to its investigation; that as a public journalist it was its duty, as well as its right, to comment upon all matters of public interest, and, as far as possible, direct attention to such facts, as it could ascertain, and that it did so in perfect good faith, and, in so doing, stated only what it believed to be true after careful investigation and inquiry; that respondents deny that they were actuated by malice, but they, on the contrary, aver that the sole motive and purpose of the publication was "to secure the advancement of the public interests, without the slightest care for individuals."

That respondents asserted in the aforesaid article that the statements were made chiefly upon the representations which a certain designated contractor with the city had made to a contemporary newspaper of the city, and that same were published in the regular course of business, as being of great public interest, and without malice, or personal feeling.

That it is the duty of an American newspaper to keep the public advised of all matters of general interest, and to aid in securing good and faithful government; and that they had the right to publish and comment upon all the events and facts surrounding the administration of the city government in good faith and without malice, and are not therefor answerable in damages to any person or official.

Summarized, defendants' answer is an averment that the publication charged to have been libelous was directed against corruption, which was at the time generally supposed to exist in the administration of the city government, and that the disclosures were made with a view to their investigation, as it was the duty of a public journalist to have done. That, in so doing, they acted in good faith and stated only what they believed to be true after careful inquiry and investigation; and that same was done without malice, and solely for the purpose of securing the advancement of the public

interest "without the slightest care for individuals." That in making said statement defendants relied upon the statements which a city contractor had contemporaneously made to another daily newspaper of the city, and which they accepted and believed.

In addition, the defendants rest their defence upon the liberty and freedom of the press.

The case was tried and decided by the judge without the intervention of a jury; and from a judgment in favor of the plaintiff for the sum of five hundred dollars, the defendants have appealed; and the plaintiff answered the appeal and prayed for the allowance to be increased to the full amount claimed.

The determination of this cause depends exclusively upon a proper construction to be placed upon the alleged libelous article, as interpreted by the managing editor of the *Daily States*, who was the only witness introduced on the part of plaintiff—indeed the only witness, of consequence, who testified in the cause.

In the course of his interrogation, many exceptions were taken and bills of exception reserved *pro et con*; but the tenor of the judge's rulings thereon was, that the witnesses' statements were admissible for the purpose of mitigating damages and not to prove justification, as no plea of justification had been made in defendant's answer. We are of the opinion that the ruling was sound and conservative, and in strict conformity to the pleadings.

For it appears from the transcript that during the progress of the trial an effort was made on behalf of the defendants to prove the truth of the charges laid in the alleged libelous article; but objection having been raised to its admissibility, on the ground that no justification was pleaded in the answer, same was sustained and the testimony rejected; but while thus ruling the judge offered the defendants an opportunity to amend their answer *instantly* and make the plea—without objection being made by the plaintiff—but the offer was declined.

The article complained of as libelous we have extracted from the paper filed in evidence, and reproduce same in its entirety, as follows, viz.:

"THE DEN OF THIEVES.

"Three members of the City Council have been indicted by the grand jury, and charges of equally as disgraceful a nature have been made against others and also against the Mayor. Under the pecu-

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Under laws of Louisiana the Criminal District Judge has felt bound to quash these indictments, and there is a general feeling of disgust throughout the community at the possibility, if not the probability, of these rascals escaping punishment for their crimes.

"It is true that an indictment is not a verdict of guilty; but the evidence on which these indictments were found is common property, and on that, together with corroborative circumstantial testimony, these men have been found guilty by the people and in the eyes of the people they are guilty, just as though they had been pronounced so by a jury and sentenced to the penitentiary by the judge. They may escape the penalty of the law, but they can not escape the condemnation and contempt of their fellow-citizens. The brand, not of Cain, but of the blackmailer and the sneak thief, is on their brows, so indelibly fixed that it will burn there in lurid letters until the coffin and the grave shall close over them forever, and their names and their acts of infamy have passed out of the memories of men. Go where they may the cry will follow them, 'Behold the bribe-takers.'

"It is distressing to think that, while the judge regards the law under which these rascals were indicted as repealed, the District Attorney and his assistant believe that the act which the judge holds repealed the law under which the indictments were found is utterly insufficient to meet the case, and hence, with a Council of blackmailers and bribe-takers on our hands, there is no law in Louisiana under which they or any one can be brought to justice.

"And while this is the situation as to the Councilmen already indicted, a new and wider view of corruption has been opened before us. We have already printed the statement of Mr. Orlopp, the contractor for building the new court house and jail, showing how he was fleeced by the gang and the friends of the gang.

"It has been shown by that statement that Mayor Fitzpatrick, after he came into office, pretended to discover that the bond which the previous administration had found was entirely satisfactory was defective, and forced the contractor to make a new and local bond, composed of the Mayor's friends, and to pay these bondsmen five thousand dollars for their names.

"It has also been shown that the firm of Manion & Co., of which the Mayor, or his wife, which is the same thing, is the chief partner, endeavored to force from the contractor twenty-five thou-

sand dollars for a job which another contractor had offered to do for ten thousand five hundred dollars, and that, finally, in fear of the power of the Mayor, and with a full knowledge that the Mayor would exercise his power, the contractor did give the Mayor's firm fifteen thousand dollars, or about five thousand dollars more than the lowest bid for the job, and thus gave up five thousand dollars of his legitimate profits under the Mayor's command to 'stand and deliver.'

"It has also been shown that City Engineer Brown took from the contractor the work of paving and gave it to his chum, and, no doubt, partner in jobbery, Fritz Jahneke, at a higher price, thus swindling the treasury in the interest of a favored individual.

"It has also been shown that at the dictation and under the threats of Brown the contractor was forced to give the glass work and interior woodwork to Mr. Henry Wellman's company, in which Brown is a stockholder, at a larger price than other parties had bid for it, and that inferior glass was put in and inferior woodwork done; that Brown accepted this inferior material and work and the contractor was thus swindled out of a part of his profits and the public swindled in the quality of the work.

"All these facts have been shown and no serious denial has been made by the parties inculpated in this rascality and these swindling operations.

"So far all these grave charges rested chiefly upon the statement of Mr. Orlopp, the contractor, who had been held up and robbed by the Mayor, the city engineer, Fritz Jahneke and the firm of Henry Wellman, Brown & Co. But another witness has appeared on the scene. Mr. Ligon was the partner and co-contractor of Mr. Orlopp. Mr. Ligon knew all the facts in these transactions and was really better informed than Mr. Orlopp, since it was through him that the blackmailers chiefly did their bulldozing. Mr. Ligon suddenly disappeared from the city when it was noised about that he was wanted by the grand jury, and much speculation was indulged in as to his whereabouts and his motive for leaving the city. He was finally located at his old home in Pittsburg, Texas, and our enterprising contemporary, the *Times-Democrat*, sent a reporter to find him and interview him. The *T.-D.*'s representative was successful, and that journal prints a dispatch giving a part of Mr. Ligon's statement, which the *States* reproduces in another column. It turns out that a

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member of the City Council (Mr. Ligon declines to give the name, except to the grand jury) gave him one thousand dollars and the assurance that seven thousand dollars due him and Orlopp on their contract, and which the hoodlums were and are holding back, would be promptly paid him if he would escape the deputy sheriffs and leave the city. The one thousand dollars were paid Mr. Ligon, but the promise to pay the seven thousand dollars due on the contract has not been fulfilled; hence, Ligon feels no moral compunction about returning to New Orleans and testifying before the grand jury. He is right. The one thousand dollars is only a small part of the money the Mayor, the City Engineer and their friends and firms have robbed him of, and as the whole of the promise had not been carried out, Mr. Ligon should come forward and expose this whole scandalous business.

“Mr. Ligon’s statement, so far as it goes, corroborates all that Mr. Orlopp has said, and goes even further. He said to the *T.-D.*’s reporter:

“‘Had Mr. Orlopp or myself refused to do as Brown directed in giving out contracts to his friends and the concern in which he was a director, he would have ruined us both by refusing to approve our work, no matter how perfect it might have been; also by refusing to approve our bill, which would have forced us into endless litigation and financial loss.’

“He further states that he and Orlopp were compelled to bribe a number of councilmen for peace and to escape wholesale robbery and ruin, and he corroborates his partner’s statement that had the original plans and specifications been adhered to, the city would have had a much better building than they have now after the revisions and jobs of the Mayor, the City Engineer, Fritz Jahncke and Wellman.

“Is it possible, under our peculiar laws, for the District Attorney and his assistants to find a law that will hold and punish these jobbers and bribe-takers? We trust there may be. The scandals that have grown out of this contract and the other corrupt acts of the City Council have attracted the attention of the whole country, and if the corruptionists can not be punished under our criminal statutes, or are not displaced by impeachment under our civil statutes, New Orleans will wear the stigma of being ruled by blackmailers and bribe-takers without laws to punish them and without a population with

the manhood to remove them from office. The Council is little else than a den of thieves. If we can not send them to the penitentiary, let us impeach them and turn them out."

The caption of the article is *The Den of Thieves*; and its opening sentence is that "three members of the City Council have been indicted by the grand jury and charges of equally as disgraceful a nature have been made against others, and also against the Mayor." Then follows the statement that these indictments had been quashed, coupled with the statement that "they may escape the penalty of the law, but can not escape the condemnation and contempt of their fellow-citizens. The brand, not of Cain, but of the blackmailer and the sneak thief, is on their brows, so indelibly fixed that it will burn there in lurid letters, until the coffin and the grave shall close over them together, and their names and their acts of infamy have passed out of the memories of men. Go where they may, the cry will follow them, 'Behold the bribe-takers!'"

In the same connection we find this statement, viz.:

"We have already printed the statement of Mr. Orlopp, the contractor for building the new court house and jail, showing how he was fleeced by the gang and the friends of the gang. It has been shown by that statement that Mayor Fitzpatrick, after he came into office, pretended to discover that the bond which the previous administration had approved as entirely satisfactory was defective, and forced the contractor to make a new and local bond, composed of the Mayor's friends, and to pay their bondsmen five thousand dollars for their names."

This is succeeded by the statement that the firm of which the Mayor was a member "endeavored to force from the contractor fifteen thousand dollars for a job which another contractor had offered to do for ten thousand five hundred dollars;" and that "finally, in fear of the power of the Mayor, and with full knowledge that the Mayor would exercise his power, the contractor did give the Mayor's firm fifteen thousand dollars, or about five thousand dollars more than the lowest bid for the job; and thus gave up five thousand dollars of his legitimate profits, under the Mayor's command to 'stand and deliver.'" (Our italics.)

After having enumerated the various charges, this general allegation is made, viz.:

"So far, all of these grave charges rested chiefly upon the state-

ment of Mr. Orlopp, the contractor, *who had been held up and robbed by the Mayor,*" etc. (Our italics.)

Subsequently, the article makes this specific declaration, viz.:

"The one thousand dollars is only a small part of the money the Mayor, the City Engineer and their friends and firms have robbed him of," etc.

That these are most grave and serious charges against the plaintiff, in his capacity of Mayor of the city of New Orleans, there can be no doubt; and, smarting under them, he filed this suit on the day after they appeared in the *Daily States*.

The managing editor of the paper, in the course of his testimony as a witness, makes the following explanation of his editorial article, The Den of Thieves, to-wit:

That, as managing editor of that paper, he wrote the article in question. That he was personally acquainted with the plaintiff, who was, at the time, Mayor of the city. Says the average daily circulation of that paper is at this time between 9500 and 10,000, though it was not so great at that time, and that four-fifths of its circulation is within this city.

He states that at that time the condition of the public mind in reference to the *status* of the city administration was very intense, "and that the general feeling in the community was that the whole thing was rotten, and that jobs were being perpetrated, and that bribery and corruption prevailed on every hand at the City Hall * * * And the publication of Mr. Orlopp's interview in the *Times-Democrat*, in which these specific charges are made, were generally accepted as true."

That it was upon that article that his editorial was chiefly predicated. Says he "would not have made the charges if (he) had not had that specific statement of Mr. Orlopp to proceed upon." Says that he "absolutely believed it to be true. When a man makes such a statement as that in so serious a manner (he thinks) he makes it upon his honor, the same as if he was before the court making a sworn statement."

That he "believed it was true then, and (he) felt it to be (his) duty to act as (he) did."

He says that in writing and publishing the newspaper article that is complained of he was not actuated by malice toward the plaintiff; that believing "in the truth of the statement published

by Mr. Orlopp (he) was absolutely satisfied that Mr. Fitzpatrick was guilty. And (he) therefore felt it to be (his) duty to make this attack in the interest of the public." That he regarded "a newspaper as the notary of the people; and when there is any act of corruption among any public officers (he) considers it the duty of the newspaper to take notice of it. But if a newspaper never was to attack a rascal, until the truth of the charge was proven in a court of justice, no scoundrel on earth in office would ever be exposed;" and he "thought (he) would be recreant to (his) duty as a public journalist if (he) did not expose what (he) *thought* to be rascality."

He says he had no grievance against the plaintiff. That he never did him any harm. "He never antagonized any interest that (he) had." That he did it "from a purely unselfish and patriotic standpoint." That he "thought the facts were proved, and it ought to be impressed upon the authorities; and that they ought to be brought to trial."

He admits that he never had a personal interview with Mr. Orlopp on the subjects mentioned in the editorial article which is complained of; but that he thought the published statements in the *Times-Democrat* were true. That he made no investigation as to the truth or falsity of the charges made in said editorial, but acted in its preparation and publication upon publications made in other newspapers, and the statements of other people.

The following is by plaintiff's counsel, viz.:

"Q. Then when you wrote this statement, you had nothing to base your plea upon, except what you had read (in) other newspapers?

"A. Only the statement of Mr. Orlopp, and the general course of legislation of the City Council, which rendered it perfectly obvious to every intelligent and investigating mind that the things charged were true.

"Q. Then the only investigations which you made was the reading of publications in other newspapers.

"A. Yes; and the action of the Council and the general drift of their legislation.

* * * * *

"Q. Did you read Mayor Fitzpatrick's denial of this charge?

"A. I believe I did, but I did not place any particular faith in it.

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"Q. Then you believed the other statement without any investigation except from other newspapers?

"A. And from public opinion.

"Q. Where did you get that public opinion?

"A. From people in the city.

* * * * *

"Q. I understand you to say that you do not know Mr. Orlopp?

"A. I don't know him personally.

* * * * *

"Q. Before the publication of this article of July 23, 1894, did you ever see any newspaper article charging the Mayor with being a robber, a holder-up, or a blackmailer?

"A. I don't remember seeing that particular thing. I saw the facts published on which I based this article in other papers."

Inasmuch as the testimony turns upon the statements which Mr. Orlopp made to the *Times-Democrat*, we have extracted same from the issue of that paper of date July 15, 1894, and reproduce them as follows, viz.:

"When I obtained the contract for the building of the new court house and jail I was called upon by the old Council, then headed by the Hon. Joseph A. Shakspeare, to give a bond of one hundred thousand dollars for the faithful performance of my contract. I furnished a bond which was signed by a Galveston banker and a Galveston merchant.

"This bond was a solvent one and perfectly satisfactory to that body. In giving out the contracts the contract for lime, sand, cement and brick was given to J. J. Clarke. The New Orleans Manufacturing and Lumber Company got the glass work and interior woodwork. The flooring furnished by this company was not in accordance with the specifications, and I objected to them, as did also the daily superintendent appointed by Mr. Brown, the City Engineer. Notwithstanding this Mr. Brown accepted the work. Messrs. Manion & Co. obtained the steam-heating, the plumbing, gas fitting and the electrical work of the building, and I don't think this work is up to the specification. Mr. Fritz Jahneke wanted the Schillinger work at one dollar and eighty cents a yard, but as I could have it done for one dollar and forty cents and one dollar and forty-five cents I would not let him have it. Mr. F. Codman Ford furnished the tiles and terra cotta flooring; Thos. Owens the slating, and P.

F. Bailey the plastering. The Crescent City Cornice Works did the sheet iron and metal work, and the Whitney Iron Works did most of the iron work.

"When the present Council came into existence Mayor Fitzpatrick insisted upon my furnishing a new bond for one hundred thousand dollars with local sureties. I protested, as the bond I had given was a solvent one and had been accepted by the Shakspeare Council. In fact, I consulted some of the old Council and they told me to stand on my rights. But then I saw that I would be plunged into litigation and a world of trouble, and to avoid this I agreed to furnish the bond. City Engineer Brown named three of the bondsmen. He selected Fritz Jahneke, Henry Wellman and J. J. Clarke. I don't know who selected the other two bondsmen. They were Henry P. Dart and T. W. Maroney. They signed the bond for me of one hundred thousand dollars, and in consideration thereof I was forced to pay them five thousand dollars. In lieu thereof I gave Mr. Henry Wellman five notes of one thousand dollars each, and in addition to this they forced me to give them an indemnity bond of one hundred thousand dollars, which was signed by the Panley Jail Building Company of St. Louis, Mo."

The only thing which is discoverable upon the face of this statement is, that when he (Orlopp) obtained the contract to build the new court house and jail from the Shakspeare administration, he furnished a bond with sureties residing in the city of Galveston, Tex., for one hundred thousand dollars; and when the Fitzpatrick administration came into power, Mayor Fitzpatrick insisted upon his furnishing a new bond "with local sureties." He says he finally consented to this, under protest, and that the persons who signed his bond charged him five thousand dollars for the service; but, notwithstanding their names are given, that of the plaintiff is not amongst them, and no charge of any sort in connection therewith is preferred against the plaintiff.

With regard to the bid of Manion & Co., with whom the plaintiff is alleged to have had some occult relations, we clip the following statement of Orlopp, from the *Times-Democrat* of July 18, 1894, viz.:

"One of the most peculiar transactions connected with the building was the steam heating and plumbing, for which Messrs. Manion & Co. got the contract from me" said Mr. Orlopp. "When I

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was about to let this contract Messrs. Manion & Co. put in a bid for twenty-five thousand dollars. I could not listen to this proposition, as I had in my possession a bid from a Dallas firm for ten thousand five hundred dollars, and a bid from Mr. J. M. Ferguson for twelve thousand five hundred dollars. Manion then put in another bid for fifteen thousand dollars, and promised me that if he was awarded the contract that he would have P. J. Maroney refund me the one thousand dollars that he had charged me for signing my bond for the faithful performance of my duty. For peace and policy sake, and this one thousand dollars consideration, I gave Manion & Co. the contract, and Manion & Co. gave over the one thousand dollars. Whether this work is according to contract and specification an investigation can very easily establish."

This statement is, that Manion & Co. obtained the contract from Orlopp for steam-heating and plumbing the new court house and jail. That they put in a bid at twenty-five thousand dollars, but it was declined because he had two prior bids at a lower figure. That Manion & Co. then put in a bid at fifteen thousand dollars, promising to rebate to him the sum of one thousand dollars, if same was awarded to them; and that he (Orlopp) accepted their proposition "for the sake of peace and harmony"—the other bids being ten thousand five hundred dollars and twelve thousand five hundred dollars, respectively.

We find quite a similar statement in regard to the one hundred thousand dollar bond in the *Daily Picayune* of July 16, 1894.

The foregoing is a fair summary of all the evidence in the record. Surely there is nothing in the extracts we have made from either the *Times-Democrat* or *Picayune* to justify the defendant's editorial assumption that Mr. Orlopp had, in the matter of the bond, been "fleece'd by the gang, and the friends of the gang;" or "that Mayor Fitzpatrick, after he came into office, pretended to discover that the bond was defective and forced the contractor to make a new and local bond, composed of the Mayor's friends," etc.

There is surely no foundation therein for the editorial assumption that Manion & Co. "endeavored to force from the contractor twenty-five thousand dollars for a job which another had offered to do for ten thousand five hundred dollars; and that finally, in fear of the power of the Mayor * * he did give the Mayor's firm fifteen thousand dollars," etc.

Nor do they show that this contractor had, in any sense, been "held up and robbed by the Mayor."

These fierce and unguarded utterances, in an editorial article appearing in a leading and influential public journal of a great and populous city, and directed against its chief magistrate, were destined to attract general attention and comment; and undoubtedly did the plaintiff great injury, personally, as well as officially, in his feelings, reputation and character. And, if untrue, they were libelous, and slanderous, in the extreme.

While admitting the authorship of, and the fullest responsibility for the editorial, the defendants do not aver, in their answer, the truthfulness of the statement and plead justification; but it is alleged to have been directed against corruption in the administration in the city government. and that the disclosures made were necessary in order to stimulate an investigation thereof, and the advancement of the public interest "without the slightest care for individuals."

That in making said statement, the editor solely relied upon the statement which a city contractor had made to another daily paper, and in the truthfulness of which he placed full confidence without making an investigation on his own account.

But it is shown by the testimony that even if the position of the defendants were perfectly tenable, that they had a right to rely upon the statements found in the local columns of another daily newspaper, and thereupon base an editorial article upon them as facts actually established, they did not conform themselves or the newspaper either to the reproduction of the statements therein made, or to proper and legitimate comments thereon. But, quite to the contrary, the defendants greatly enlarged the statement contained in the articles relied upon, employing the language of personal denunciation and abuse under a mistaken notion of rendering a service to the city, regardless of the rights of the individuals assailed, and amongst them the plaintiff.

The caption of the article. "*The Den of Thieves*," was an appropriate heading for an editorial of that character, though it is far from the view we entertain of "the liberty of the press" to intimate that it can be excused or palliated on that ground.

While we feel free to admit that the preservation of good and pure government, either in city or State, greatly depends upon a free and

fearless expression of public sentiment through the columns of the journals of the country, yet we are equally free to affirm that same must and can be accomplished by cogent, temperate and well-reasoned articles, predicated upon facts, and not in hasty, intemperate and opprobrious epithets and personal criticism and abuse.

There is a marked and clear distinction to be taken between the *liberty* and the *license* of the press.

Judge Cooley states that "it is conceded on all sides that the common law rules that subjected the libeller to responsibility for the private injury, or the public scandal or disorder occasioned by his conduct, are not abolished by the protection extended to the press in our Constitution." Cooley's Con. Lim., p. 420.

And that author approvingly quotes the rule announced by Chief Justice Parker in *Commonwealth vs. Blanding*, 3 Pickering, 318, that "the liberty of the press was to be unrestrained, but he who used it was to be reasonable in case of its abuse; like the right to keep fire-arms, which does not protect him who uses them for annoyance or destruction."

That author formulates the following rule upon the subject, which has met the unqualified approval of jurists and publicists, v. z. :

"The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizens may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity or scandalous character, may be a public offence, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or, to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords." *Id.* 421.

And in treating of the right of action by the party injured by any publication, that author very justly observes:

"There are (at common law) many cases, also, where the law presumed injury, and did not call upon the complaining party to make any other showing that he was defamed than such implication as arose from the character of the communication itself. If it accused him of a criminal offence, involving moral turpitude, and such as

would subject a party proved guilty of it to punishment by imprisonment; * * * if the charge affected the party in his business, office or means of livelihood, like charging a trader with insolvency or the like; or if any injurious charge holding a party up to public contempt, scorn or ridicule were propagated by printing, writing, signs, burlesques, etc., the law presumed injury, and the charge was said to be actionable *per se*." *Id.* 425.

But to that general rule that author states the following exception, viz.:

"There are certain cases where criticism upon public officers, their actions, character and motives, is not only recognized as legitimate, but large latitude and great freedom of expression are permitted, so long as good faith inspires the communication." *Id.* 431.

And, having commented on the authorities, he remarks that "recent English cases give considerable latitude of comment to publishers of public journals, upon subjects in the discussion of which the public may reasonably be supposed to have an interest; and they hold the discussions to be privileged if conducted within the bounds of moderation and reason." *Id.* 440.

Kelley vs. Sherlock, 1 Law Reporter, 2 B., p. 686.

In confirmation of this opinion, the case of *Wason vs. Walter*, L. R. 4, Queen's Bench, 73, is cited, in which the proprietor of the *London Times* was prosecuted for criticism of certain debates in the House of Lords, and it was therein held that this was a subject of great public concern, on which a writer in a public newspaper had a full right to comment; and that the occasion was so far privileged that the comments would not be actionable "so long as a jury should find them honest and made in a fair spirit, and such as were justified by the circumstances disclosed in the debate."

Having given due attention to the authorities *pro* and *con*, that author makes the following summary of the law of privilege, in respect to newspapers, viz.:

"The question, however, is not new, and the authorities have generally held the publisher of a paper to the same rigid responsibility with any other person who makes injurious communications. Malice on his part is conclusively inferred if the communications are false. It is no defence that they have been copied with or without comment from another paper; or that the source of information was stated at the time of the publication; or that the publication was

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made in the paper without the knowledge of the proprietor, as an advertisement or otherwise; or that it consists in a criticism on the course and character of a candidate for public office; or that it was a correct and impartial account of a public meeting, or of any proceedings in which the public have an interest," etc. *Id.* 455.

Of the foregoing principles we find the following cases to be correct exponents, viz.: *Hotchkiss vs. Oliphant*, 2 Hill, 510; *King vs. Root*, 4 Wendell, 138; *Sanford vs. Bennett*, 24 N. Y. 20; *Dole vs. Lyon*, 10 Johns. 447; *Mapes vs. Weeks*, 4 Wendell, 659; *Inman vs. Foster*, 8 Wendell, 602; *Andus vs. Wells*, 7 Johns. 260; *Huff vs. Bennett*, 4 Sandf. 120; *Martin vs. Van Schaick*, 4 Paige, 479; *Commonwealth vs. Nicholls*, 10 Metcalf, 256.

In *King vs. Root*, *supra*, the court announced the general rule to be "to permit editors to publish what they please in relation to the character and qualifications of candidates for office, but holding them responsible for the truth of what they publish."

Mr. Black, in treating of the "freedom of speech and of the press," in his recent treatise on American Constitutional Law, gives this interpretation of the constitutional guarantee, viz.:

"In respect to the privileges secured by this guarantee, and with regard to responsibility for its abuse, there is no difference between 'speech' and 'the press.' It is a mistake to suppose that there is a liberty of speech and a liberty of the press, which are in any way different or distinct. The constitutional provision is designed to insure immunity for the expression of opinion. And it makes no difference whatever whether the opinion be expressed orally or in print. It is to be noticed that the constitutional guarantee here considered does not create any new right not previously understood to belong to the people." *Black's Constitutional Law*, Sec. 164.

"But the freedom of speech," says that author, "and of the press, does not mean unrestrained license. It can not for a moment be supposed that this guarantee gives to every man the right to speak or print whatever he may choose, no matter how false, malicious or injudicious, without any responsibility for the damage he may cause. The guarantee does not do away with the law of liability for defamation of character. On the contrary, that law is not only consistent with the liberty of speech and of the press, but is also one of the safeguards of those who may use, but do not abuse, this liberty." *Ibid.*

In treating of the law of "conditional privileges," that author says "a publication is said to be conditionally privileged when the author of it is not to be held accountable for its falsity if it was made for good ends and from justifiable motives; but otherwise, if it was made with malicious intent to injure individuals." *Ibid.*

In applying this precept to the case of a newspaper, that author formulates the modern doctrine thus:

"It has often been claimed that the publishers of newspapers, in view of the peculiar nature of their business of gathering and disseminating news, should have a more liberal exemption from liability to the law of libel than persons engaged in other occupations. But this claim has never been conceded by the courts. The established rule is, that when the publication is made in good faith, in the ordinary course of the publisher's business, and without any intention to work injury to the reputation of the subject of it, the party injured by the false statement will not be allowed to recover anything more than his actual damages. *Ibid.* 480.

The author cites: Cooley's Con. Law, 2 Ed. 293; Detroit Daily Post and Tribune Company vs. McArthur, 16 Michigan, 447; Perret vs. New Orleans Times Newspaper, 25 An. 170.

In the case first cited the court says:

"The law favors the freedom of the press so long as it does not interfere with private reputation or other rights entitled to protection. And inasmuch as the newspaper press is one of the necessities of civilization, the conditions under which it is required to be conducted should not be unreasonable or vexatious."

And they further say:

"When the wrong done consists in a libel—which can never be accidental—the publishing is, therefore, always imputed to a wrong motive, and that motive is called malicious. And, in the absence of any testimony showing the origin and circumstances of the publication, it stands before the jury as a voluntary wrong until palliated or excused; while the actual motive, whether intensifying or mitigating the moral guilt, may be shown to qualify it."

Again:

"There is no doubt of the duty of every publisher to see at all hazards that no libel appears in his paper. Every publisher is, therefore, liable, not only for the estimated damages to credit and reputation, and such special damages as may appear, but also such

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damages, on account of injured feelings, as must unavoidably be inferred from such libel, published in a paper of such a position and circulation." P. 453.

And in the case last cited by Judge Black—Perret vs. New Orleans Times Newspaper, 25 An. 170—wherein the plaintiff claimed damages on the ground that the defendant had inferentially charged him with having committed a robbery, the court said:

"We regard the doctrine as no longer controverted, that the publication of any communication * * * which is defamatory and false, subjects the publisher, as well as the author, to damages in favor of the party aggrieved. Circumstances may be shown in mitigation of damages. The law looks to the *animus* of the publisher in permitting his columns to be used as a vehicle for the dissemination of calumny, whereby the fair character of an individual may be blasted and his business prospects ruined. * * * The law imputes malice in the publisher, from the act of publishing the libel; not malice in the sense of spite, antipathy or hatred toward the party assailed, but the evil disposition, the *malus animus* which induced him wantonly, or negligently, in disregard of the rights of others, to aid the slanderer in his work of defamation, by the potent energy of the public press—written or printed slander being considered as more pernicious than that uttered by words only."

These decisions are in strict keeping with the opinions expressed in more recent cases.

In Bigney vs. Van Benthuyzen, 36 An. 38, this court said that newspaper editors "are held to the same responsibility with any other person, and malice on their part is conclusively inferred, if the publication is false. It is no defence that it has been copied from another newspaper without comment, or that the source of the information is stated at the time of the publication," etc.

The court, after citing authorities, puts the proposition in this vigorous style, viz.:

"If an editor or publisher chooses to become the retailer of private scandal, without taking the trouble to inquire into the truth of what he publishes, the law, which is as studious to protect character as the property of a man will hold him to responsibility.

"The rule is not only just and wise in itself, but if strictly and inflexibly adhered to and applied by the courts and juries will greatly tend to the promotion of truth, good morals and common decency

on the part of the press, by inculcating caution and inquiry into the truth of charges against private character before they are published and circulated throughout the community."

Very much the same language is employed in *Staub vs. Van Benthuyssen*, 36 An. 467.

Having been at the pains to closely scrutinize all the authorities and text writers, both ancient and modern, we find them consistent and uniform to the effect that the publication of statements selected from other journals that are injurious to the reputation or character of private individuals or public officials; or editorial articles favorably commenting thereon, if false in fact are libelous and defamatory, and are presumed to be malicious, and, therefore, actionable. The authorities, English as well as American, have generally held the publisher and editor of a newspaper to the same rigid responsibility with any other person who makes injurious communications. Malice on his part is conclusively inferred, if the communications are false, in fact. It is no defence that they have been copied with or without comment, from another paper; or that the source of information is stated at the time, and the information is believed to be true.

The freedom of speech and liberty of the press were designed to secure constitutional immunity for the expression of opinion; but that does not mean unrestrained license, nor does it confer the right upon the editor of a newspaper to print whatever he may choose, no matter how false, malicious or injurious it may be, without full responsibility for the damage it may cause.

The modern rule with regard to the conditional privilege which newspaper publications enjoy is that when the publication is made in good faith, in the ordinary course of the publisher's business, with good motives and for justifiable ends and without any intention to work injury to the reputation or character of the subject of it, the party injured will be restricted in his recovery to actual damages.

But every publisher is therefore liable not only for the estimated damages to credit and reputation and such special damages as may appear, but also such damages on account of injured feeling as must unavoidably be *inferred* from such libel, published in a newspaper of large circulation and position of influence.

As the law looks to the *animus* of the publisher in permitting his

Fitzpatrick vs. Publishing Co., Limited, et al.

columns to be employed for the dissemination of calumny, circumstances may be shown in mitigation of damages.

It was upon this ground that our learned brother of the lower court placed his rulings and must have rested his judgment, and the circumstances pointed to as justifying the judgment were that the administration of the government of the city of New Orleans had become so notoriously corrupt that suspicion in the public mind rested alike upon all those in any manner connected with it and urgently demanded investigation and reform. That the defendant, as a faithful and fearless public journalist, felt in duty bound to direct public attention to this serious condition of public affairs, and consequently when Orlopp, an important city contractor, made the aforesaid disclosure to other city papers, he deemed it the discharge of a public duty to make upon them the editorial comment that is complained of. With all due consideration given to this commendable purpose, we can not hold that the publication entitled "The Den of Thieves" can be considered as protected by the conditional privilege of the press.

The law is studious to protect the character as it is to protect the property of a man. This rule is not only just and wise, but if strictly adhered to, and inflexibly maintained and applied by the courts, it will greatly tend to the promotion of truth, good morals and good citizenship, by encouraging caution, and inquiry into the truthfulness of charges before the damaging publication is made and circulated throughout the community.

In this case no claim is made to the effect that the statements made in the defendants' editorial were true; but that under the circumstances, he believed them to be true. But he did not personally know the facts related to be true, and instituted no inquiry for the purpose of ascertaining their truth or falsity. The irresistible inference is that the statement was slanderous and libelous and within the meaning of the law, malicious and, as such, actionable. But we think the defendant is only bound for actual damages, and that they include wounded feelings and a sense of injury and wrong suffered by the plaintiff. We think the judgment appealed from correct and it is affirmed.

State ex rel. Wilkinson vs. Judge.

No. 12,198.

**STATE EX REL. JAMES WILKINSON VS. ROBERT HENGEL, JUDGE OF
THE TWENTY-SECOND JUDICIAL DISTRICT.**

When a District Judge is a party to a contested election suit, and his recusation is suggested on the ground of personal interest, it is his duty to enter in said cause an order, in open court at term time, recusing himself, and for the trial thereof, appoint some judge of an adjoining district to go into his court and try and determine the cause.

In case said recused case has not been tried within nine months from the date of the judge's recusation, it shall then be the duty of the judge to order the transfer of the case into the court of an adjoining district for trial.

There is no law in force which provides for the order of recusation to be entered in chambers, and *mandamus* will not go to respondent coercing him to do so.

ON APPLICATION for Writs of *Mandamus* and Prohibition.

James Wilkinson, in propria persona, Relator.

E. H. McCaleb and John Dymond, Jr., Respondent.

Submitted on briefs June 6, 1896.

Opinion handed down June 15, 1895.

APPLICATION FOR WRITS OF MANDAMUS AND PROHIBITION.

The opinion of the court was delivered by

WATKINS, J. The representations of the relator are that on the 12th of May, 1896, he filed a suit against the respondent in said judicial district and parish of Plaquemines, entitled James Wilkinson vs. Robert Hingle, bearing the docket number 213—the original record, and all the proceedings in which are annexed and made part of the proceedings herein for reference—"contesting his title or right to the office of district judge."

That there being no term of court for said parish within the five weeks ensuing after the service of his petition in said suit, the then presiding judge of said court granted an order directing a special jury to be summoned for the trial of said cause; and further ordered that said cause be fixed for trial before said jury on the third Monday in June, 1896.

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That soon thereafter the respondent was commissioned as judge of said court, and he (relator) called upon him, and formally petitioned him to recuse himself in said cause, and appoint some judge of an adjoining district to try the same.

That the respondent should have recused himself without delay, yet he has, on the contrary, "failed and refused to recuse himself, stating that he can issue no order, or do anything in this cause save during a session or term of court."

Thereupon relator represents "that such failure and refusal on the part of the respondent is illegal, and a denial of justice on his part;" and "that unless the said recusation is had and a judge appointed to try said cause before the said day is appointed for the trial thereof, that the special jury (summoned) to try the same will have to adjourn and be resummoned, or finally discharged and a new jury selected."

That he is entitled to a summary trial, and to have said application for the recusation of the judge acted upon immediately and in chambers; and to have the respondent enter an order making a summary and immediate transfer of said cause "to an adjoining and impartial forum" for immediate trial and decision.

Relator alleges that subsequent to the formal tender of his plea of recusation the respondent is without right or authority to grant any order or take any action in the aforesaid cause, save and except to recuse himself and appoint another judge to try the same.

It is on the foregoing averments that the relator prays for a writ of *mandamus* to compel the respondent to enter an order in chambers and *instantly* recuse himself, and for a writ of prohibition preventing him from granting any other order, or taking any further action in said cause.

The substance of relator's plea of recusation in the aforesaid suit is, that respondent has a paramount interest in the trial and decision of said cause, and that same is sufficient "to warp his judgment and prejudice his mind in deciding same." Thereupon he represents it to be the duty of respondent "to forthwith recuse himself in this cause and appoint the senior judge of the Civil District Court for the parish of Orleans to try said cause in his place and stead," etc.

As soon as said plea was handed to the respondent in chambers during the vacation of his court, he made the following counter-statement, substantially, in reply, to-wit:

That considering the provisions of Act 40 of 1880 he would have the right to select the judge to whom the plea of recusation should be referred for trial; and further considering that the provisions of Act 24 of 1894 have materially changed the procedure in contested election cases to one of ordinary form, his conclusion was that there is no law authorizing him to grant an order in chambers recusing himself, but that same can alone be made in open court. Therefore he declined to enter the order in chambers, and deferred action until such time as his court should be in session for the transaction of business.

The relator's plea of recusation and his answer thereto are annexed to and made parts of his return; and therein are set out with some elaboration the same grounds for the denial of relief in the premises to the relator.

Considering the allegations of the petition and the respondent's return, the sole question for decision appears to be, whether the law makes it the plain ministerial duty of a judge having a personal interest in a suit pending in his court to at once, and in chambers, enter an order recusing himself upon his recusable interest being suggested by one of the parties thereto; and the result must be that if we do not find that such duty is plainly imposed by law the relief prayed for by the relator must be refused.

Relator relies mainly upon the provisions of Act 129 of the extra session of 1877 as controlling the method of transferring contested election cases, in case the judge of the court wherein same are pending shall be recused. His counsel states that "by the provisions of the above law the plea to the recusation could be filed at the time of filing the cause, or at any time previous to its assignment, and was to be passed upon and the case sent with the record to the judge of the adjoining district * * * Under the plain letter of this law (the act of 1877) the plea was to be filed and acted upon immediately." Brief, p. 2.

On the contrary, counsel for respondent contends that under the provisions of Act 72 of 1884, he was entitled to a delay of thirty days within which to pass upon any matter submitted to his court, and consequently relator's application was premature.

His contention on the merits is, that there is no law authorizing the judge to grant an order of recusation in chambers—that is, out of term time. That not only is there no law authorizing, but none re-

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quiring that such an order be granted otherwise than in open court, at term time; and that in the absence of any such requirement, the respondent can exercise his discretion.

That the former law providing for the summary trial of contested election cases was repealed by Act 24 of 1894, which provides that cases of contested elections for State, parish, district and municipal offices shall be filed and tried as ordinary suits, except that they shall enjoy a preference of trial over other ordinary suits.

And based on that statutory change, the further contention of respondent's counsel is, that such cases shall be tried at regular terms of court, by juries regularly selected for attendance upon such terms of court—in case jury trials shall be applied for—and consequently there is no occasion for that celerity of proceeding which is suggested in the petition of relator with respect to a chamber's order of recusation.

They insist that a district judge is a State officer within the meaning of the law in respect to contested elections, citing *Wilson vs. Wiltz*, 82 An. 691; *State ex rel. Attorney General vs. Lamantia*, 83 An. 449, and *Sheboygan County vs. Parker*, 3 Wallace, 98.

Finally, counsel for the respondent insists that Act 40 of 1880 is the law in force with regard to the recusation of judges elected under the Constitution of 1879; and they specially invoke the interpretation which this court gave to that statute in *State ex rel. Jones vs. Judge*, 41 An. 819.

They also make the point that *mandamus* is not a writ of right and will not go in any case in which adequate relief can be obtained by appeal, citing *State ex rel. Helphen vs. Judge*, 88 An. 97; *State ex rel. Railroad Company vs. Judge*, 86 An. 894.

Per contra relator's counsel insists that it was equally the duty of the respondent, under the law of 1877 or of 1880, to have made the order of recusation in chambers.

We may preface our examination and conclusion with the statement that, in our opinion the relator's case must stand upon the law in respect to the time and manner in which an order of recusation must be made by a judge on account of his personal interest in the suit which is depending in his court; and that the equitable consideration suggested by relator can not aid or assist in the least, in the interpretation of matters of our supervisory power.

We may further premise by saying, that in our opinion Act 72 of

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1884, refers in terms to "causes taken under advisement by district judges," exclusively, and not to orders of recusation and the like.

An examination of Act 129 of 1877, extra session, discloses that in a suit to contest an election for a judicial office, wherein the presiding judge of the district has a personal interest, "on motion of the defendant or of the plaintiff, either may, *at any time before the assignment of the case, have the same transferred to and tried by the judge of the District Court whose residence is nearest to the residence of the defendant.*" Sec. 1.

It further provides that "the plaintiff or the defendant may, at the time the suit is instituted or at any time after, *apply to the judge of said residence* for a rule issued to the judge who can not try the case because recused on his own motion," or otherwise, "to show cause within three days from the date of service of said rule why *he should not try the case*, and that, in applying for said rule, the said plaintiff shall swear that the defendant is interested," etc. Sec. 3.

It further provides "that upon the said application being made, it shall be the duty of *the judge applied to* to make the said rule absolute if cause of recusation exists and if his residence is nearest to the residence of the defendant, as above mentioned," etc. Sec. 4.

The substance of the foregoing provisions is that when a district judge is personally interested in a suit contesting his election to such judicial office, either party may at any time before the assignment of the case for trial have the cause assigned to and tried by the judge of an adjoining district, and that at the time the suit is filed, or at any time thereafter, apply to the judge of the adjoining district to whom it is assignable, for a rule upon the judge who has an interest to show cause within three days why the former should not try the case.

That upon said application being made, and sworn to, it shall be the duty of the judge applied to—that is, the judge of the adjoining district—to make said rule absolute, if cause of recusation exists.

From the foregoing analysis of that act, it seems clear, that the purpose of the Legislature was to deprive the judge who was personally interested in a contested election suit, of all power over the question of his recusation *vel non*, and to confer it upon the judge of the adjoining district, exclusively.

This is not the interpretation which the relator has placed upon

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that statute. It is just the opposite view of it that he has taken, in asking for a writ of *mandamus* to coerce the respondent to perform a duty, the power to perform which was expressly taken away from him thereby.

Referring to Act 40 of 1880, we find it is general law upon the subject of the "causes of recusation of the district judges and the trial of recused causes;" and it specially provides "that in cases in which a judge of the District Court shall be recused for the cause of interest, he shall, for the trial thereof, *appoint some district judge of an adjoining district*, * * * and the order of the court making the appointment shall be entered on the minutes thereof," etc. Sec. 3, Act 40 of 1880.

And it is made the duty of the judge thus appointed "to go to the court at which the recused case 'is pending,' and there try and determine the case." *Ibid.*, Sec. 4.

It further provides, that if said recused case "has not been tried *in nine months* from the date of the recusation, it shall be the duty of the district judge to order the *transfer of such case to the District Court* of the nearest parish of an adjoining district, the judge of which is competent to try the cause," etc. *Ibid.*, Sec. 5.

It further provides, that "all laws or parts of laws in conflict with this act be and the same are hereby repealed." *Ibid.*, Sec. 8.

It is quite apparent that this law covers the same ground exactly as that which is covered by the Act of 1877. In other words, the mode to be pursued at the inception of a contested election suit, in which a District Judge has a personal interest, is for the recused judge to appoint the judge of an adjoining district to try said recused case, whose duty it shall be to go to the court in which the recused case is pending and try the same. It is equally apparent, that the respondent would have violated the provisions of this act, if he had attempted to transfer this cause to a judge of some adjoining district under the Act of 1877, as the relator proposed to have him do, and before the lapse of the period of nine months. Indeed, that act seems to us illogical, in that it proposes to summarily divest a District Judge of all power over a cause pending in his court, and to assign the same to the judge of an adjoining district for the purpose of determining the recusable interest of the judge, upon the simple motion of a party to the suit, and who is directly interested in the result thereof.

Succession of Barry.

Certain it is, that, under the Act of 1880, the respondent had neither power or authority to transfer the cause of *Wilkinson vs. Hingle* "to an adjoining and impartial forum" for immediate trial and decision, as relator claims he should have done; and has not made himself amenable to *mandamus* because he has declined so to do.

The Act of 1880 was examined and construed in *State ex rel. Gates vs. Judge*, 38 An. 452.

It has been settled by judicial construction, that the act of 1877 was repealed and superseded by the act of 1880.

State ex rel. Jones vs. Judge, 41 An. 319.

From a careful review of all the legislative acts and authorities bearing on the question, it appears that the plea of recusation must be formally filed in the contested election suit, and the judge whose recusation is thus tendered should enter his order recusing himself, and call the judge of an adjoining district to come into his court and try the recused case—if the cause of recusation is conceded, or apparent; but same is alone triable in open court. *State ex rel. Segura vs. Judge*, 37 An. 253; *Hunter vs. Blackman*, Man. Unr. Cases, 427; *State ex rel. Trimble vs. Judge*, 38 An. 247.

The judge thus selected must leave his own court, and go into the court of the recused judge, and try and decide the case conformably to the provisions of Act 24 of 1894, as a district judge is a district officer in the sense of that statute; and they declare that such suits as come within the contemplation of that act shall be tried "in all respects as ordinary suits." And the provisions of that act are general and sweeping and embrace all officers therein enumerated, whether State, parish, district, or municipal; and in this respect they are an enlargement of those of Act 24 of 1877.

Our conclusion is that relator has not stated a case entitling him to relief, and hence the preliminary restraining order is set aside, and the relief prayed for denied at his cost.

Nos. 11,950 AND 12,163.

SUCCESSION OF THOMAS BARRY.

The marriage decreed null produces civil effects when contracted in good faith. The wife, who in good faith, marries a divorced man believing that the divorce was legally obtained; if the divorce be subsequently declared a nullity is protected by those laws enacted for the protection of the weak and innocent.

Succession of Barry.

The effects which the husband and wife, at the time of the dissolution of the marriage, own are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage.

The same rule applies to a putative marriage in so far as the spouse, in good faith, is concerned.

The costs of settlement of community interests are charged to each in proportion to the interest of the respective parties.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Louque & Pomes for Mrs. T. Barry, Administratrix and Heir, Appellant in 11,950, Appellee in 12,163.

Dart & Kernan for Christine Folz *et al.*, Opponents, Defendant Appellees in 11,950, Appellants in 12,163.

Argued and submitted May 8, 1896.

Opinion handed down May 18, 1896.

Rehearing refused June 30, 1896.

The opinion of the court was delivered by

BREAUX, J. The public administrator applied for the administration of the succession of the late Thomas Barry.

Mrs. Mary Barry opposed the application, alleging that she was the widow of Thomas Barry.

This court held, in the former appeal, that there was evidence of a suit for divorce and of a judgment rendered, dissolving the marriage, but that it was not sufficiently shown that any decree had ever been signed. Succession of Thomas Barry, 47 An. 888, 841.

The administration having been entrusted to Mrs. Mary Barry, she filed her final account.

The heirs of Margaret Barry, averring that she was the wife of Thomas Barry, claim by inheritance her interest in the community which, they contend, existed between her and Thomas Barry.

The District Court maintained their opposition and decreed that they were entitled to a portion of the community.

From the judgment of the District Court the appellant prosecutes this appeal in her individual capacity and as administratrix.

Succession of Barry.

The appellees have accepted the judgment as correct and have made no application to amend the judgment. In so far as relates to the appellees, no issue is presented by them in regard to the amount allowed as their share of the community.

The appellant urges that Margaret Barry never was the wife of Thomas Barry, as the latter Thomas Barry had not obtained a divorce prior to the marriage ceremony, whereby Margaret Barry claimed to have been united in marriage with him.

In the second place it is contended that no community property was acquired by them.

It is not denied that Thomas Barry was married to the appellant in 1874 and that she separated from her husband. It is also admitted that proceedings for a divorce were instituted by Thomas Barry against his first wife. The point of difference between the appellant and appellees is whether it was prosecuted or not to a final judgment. While not conclusive there is proof before us that a judgment of divorce was rendered. But we are not concerned with the finality or validity of that decree, as the question is the good faith *vel non* of the second wife, from whom the appellees inherit.

The second wife was married to Thomas Barry on the 12th of May, 1879. The marriage was duly solemnized; she died without issue in January, 1886.

The evidence discloses that she was industrious and economical. She was a wage earner, and her small earnings became part of the common property.

The first wife, who is the appellant here, lived in this city under the name of Mary Doyle, a name by which she was known after her separation from her husband. She never, at any time, disclosed to any one, as far as the record shows, that she was the wife of Thomas Barry. She, by her silence, lent countenance to statements that he was a divorced man. After his death, a few years after the death of his second wife, the widow Mary Barry, who claims that she is the sole heir of the community, did not attend the funeral, and was indifferent, save as to the property, to recover which she invoked ties of matrimony long ignored, ties which had been advertised as dissolved as required by law in matter of divorce in the official journal. A judgment of divorce was advertised as required by law in matter of divorce.

The judgment is lost, or possibly the advertisement was unauthor-

Succession of Barry.

ized and unsupported by judgment. Be this as it may, the second wife and her family, prior to her marriage, had reason to believe that Thomas Barry was a divorced man; a status supported by common report. It is not the case of one who becomes the hasty and thoughtless victim of the merest impostor. He was known, and had, during many years in this city by his industry, accumulated a few thousand dollars.

The evidence at hand, after many years since the divorce proceedings, may not have been sufficient to prove conclusively that the divorce had been decreed, and yet justify the belief, in good faith, that it had been granted.

There was error on the part of the wife; it was not, however, under the circumstances inexcusable. The record discloses that the wife was ignorant of any pre-existing hindrance to her marriage. Her memory, in all justice, should be acquitted from the obloquy of concubinage, for she, we believe, became Thomas Barry's wife in good faith. She had no cause, in reason, to suspect that he was not the divorced man he represented himself as being. He also seems to have acted in good faith. May it not be that the copy of the judgment was lost or mislaid, and that he did not commit the offence charged. Her good faith, at any rate, is sustained, as we appreciate the evidence.

"L'époux qui ignore que son conjoint est engagé dans les liens d'un mariage est de bonne foi; cela a été jugé, et, en vérité, il ne faut pas d'arrêt pour démontrer ce qui est clair comme la lumière du jour." Laurent, Vol. 2, p. 636.

As the wife had reason to believe that the tie uniting them was legitimate, the marriage produced civil effects. The marriage contracted on the faith of a divorce, although it subsequently is decreed that the divorce was null, will have civil effect in favor of the spouse who was in good faith.

This being our conclusion in regard to the good faith of the second wife, it follows that the community must be settled as if there had been a community in fact under a marriage in regard to the legality of which there was no question.

But it is contended by the appellant, Mary Barry, that the record does not disclose that there was a profit enuring to the community at the death of Margaret Barry, the second wife, in 1886.

The proof upon this point is an act of sale signed by Thomas

Succession of Barry.

Barry. A declaration in the act shows that the property was bought by him during the existence of the community with the second wife. The declaration, unquestioned as to its correctness, proved the date it was bought.

The purchase by him and the sale were made during the existence of the community.

The objection more particularly pressed upon our attention is: If Barry came into possession of the price of the property in 1884, *non constat* that the money was still in his possession when Margaret Barry died in 1886.

We think a statement of the fact bearing upon this point is a satisfactory answer to the objection.

The credit portion of the sale of the community property was collected by the survivor in community after the death of the second Mrs. Barry. It was an asset of the community collected after its dissolution.

With reference to the cash paid at the time that the deed was signed, about nine months prior to the death of Mrs. Margaret Barry:

We do not find that the cash portion of that sale is included in the amount allowed to the heirs of Mrs. Margaret Barry, and therefore the objection is not sustained by the fact.

As to the remainder collected after her death, it was beyond all question community, and as such properly distributed by the judgment of the District Court.

The article of the Code is plain. Its effects are divided in the equal portions at the dissolution of the marriage, and all effects are presumed common effects, in making this division, unless it be satisfactorily proved which of such effects they brought in marriage. C. C. 2405.

The promissory notes in the possession of the husband at the dissolution of the marriage must be accounted for in the settlement of the community. It is a fair inference that they have been collected by him.

Both appellant and appellee have directed our attention to a clerical error in the judgment; the names of the mother of Margaret Barry, Mrs. Christine Foltz, and the name of a brother, John G. Foltz, were omitted. The amendment of the judgment will, therefore, be made by inserting the names of all the opponents in the judgment.

 Lehman & Co vs. Knapp et al.

By consent of counsel, Mrs. Mary Barry's appeal and the devolutive appeal of the opponents are heard at the same time, and the question of costs, in so far as relates to opponents, is decided.

The appellees ask that the judgment be amended by striking out the clause of the judgment decreeing a contribution to the costs and expenses in proportion to the sum allowed to the opponents.

The settlement was for the benefit of both communities, and to enable each to receive its portion; that settlement enters into the settlement of the succession, and the costs were properly taxed by the judge of the District Court.

It has been said in a case similar to this case that the rule the most reasonable to follow is to consider the property acquired during each marriage as belonging to the community of each marriage (as the result of a partnership such as partnership composed of two strangers) and to divide the acquets and gains, not according to the rules applying to the conjugal community, but according to the rules whereby generally partnerships are governed.

In the case of the settlement of two partnerships the costs would be taxed as they are here taxed.

We think it just to apply the rule which applies to the settlement of partnerships.

It is therefore ordered, adjudged and decreed that the judgment appealed from is affirmed with the following amendments, making Mrs. Christine Foltz, mother, and John G. Foltz, her brother, parties to the appeal, and to the judgment decreeing that as heirs of Margaret Barry they are entitled to inherit the sum stated in the judgment.

As amended, the judgment is affirmed at appellees' costs in each case, *i. e.* 11,950 and 12,163.

 No. 11,945.

A. LEHMAN & CO. VS. S. A. KNAPP ET AL.

The plaintiffs are creditors of the defendants for goods sold them by the latter.

Burden of Proof.—As to whether the store was exclusively kept to supply the employees and was not to sell to all comers, the *onus* was shifted by evidence strong enough to establish a *prima facie* case against the defendants. After the burden had changed to the defendants they did not sustain their defence by proof of particular facts which were more particularly within their knowledge.

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48 1148
116 412
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117 410

Lehman & Co. vs. Knapp et al.

Act Relative to Corporations prior to 1888.—A corporation may, as to its legal existence, be entirely legal and protect its shareholders fully to construct and operate a railroad and to engage in planting, under laws preceding the act of 1888; and yet the shareholders are responsible personally for carrying on a commercial partnership in addition.

Corporation Limited.—Where a corporation is created under a general statute which requires that it shall be incorporated as a corporation limited, the limitation must so appear in the act of incorporation, otherwise the private interests of those who signed the act, and were its directors, will become responsible under the terms of the statute.

Estoppel.—Merchants who sell goods for merchandising to a corporation do not thereby preclude themselves from holding the shareholders personally bound after ascertaining that, as to their mercantile transactions, they are responsible as commercial partners.

A motion to vacate the appointment of a receiver was not an estoppel of record.

Not a New Question.—There are general statutes in a number of States, also in England, giving authority to create joint stock companies "limited," and importance, in these jurisdictions, is given to the use of the word limited, as in Louisiana.

A PPEAL from the Twelfth Judicial District Court for the Parish of Calcasieu. *Fournet, J.*

Arsene P. Pujo for Plaintiffs, Appellees.

D. B. Gorham and *T. T. Taylor* for Defendants, Appellants.

Argued and submitted February 10, 1896.

Opinion handed down February 24, 1896.

Rehearing refused June 25, 1896.

The opinion of the court was delivered by

BREAUX, J. This is a suit by appellee against appellants as co-partners to recover for goods sold and delivered.

Defendants plead the general issue, and in support of their existence, as a corporation, they interpose the further plea of estoppel.

The defendant, with another shareholder, not made a party, procured a charter of incorporation for the Teche Railroad and Sugar Company to build and operate a line of railway from "Huron Plantation" in St. Martin parish to stated points; also to own or lease plantations, to grow cotton, rice and sugar, to deal in securities and merchandise, to operate sugar houses and refineries.

Lehman & Co. vs. Knapp et al.

One of the defendants, charter member, was president, another vice president, another secretary, and the last, the treasurer, was not sued.

In the resolutions of the board of directors and in all the dealings and orders of the company the word limited was used. The accounts were made out and rendered to the defendants in the name of the company, "limited." The plaintiffs were aware that Mr. S. A. Knapp was the general manager and president, and that the store to which the goods were sold was kept on the Huron plantation. The two clerks, under the directions of the president, were to sell (the manager and president testified) only to the employees. These clerks have not testified.

Three (8) witnesses testify that it was a public store for all comers.

About one year after the company had been in operation, it became embarrassed because of failure to negotiate an expected loan in England on mortgage bonds.

On the motion of a foreign creditor it was placed in the hands of a receiver, under appointment of the United States Circuit Court for the Western District of Louisiana. The plaintiffs, with other creditors, filed a motion in that court to vacate the receivership, alleging that there was no ground for the appointment; further, that the corporation, though incorporated as the Teche Railroad and Sugar Company, did business in the name of the Teche Railroad and Sugar Company, Limited. The motion, without action by the court, is of record.

AS TO MERCHANDISING.

The corporate name was, as alleged, the Teche Railroad and Sugar Company. It is a disputed point whether the store was for the use of the plantation, exclusively as a supply store, or a general country store in which goods were sold to the general public.

We will take up and decide the only question of fact in the case before taking up and deciding points involving questions of law.

Goods for the store in question were bought from the plaintiffs and sold at defendants' counters. That they were sold and delivered by the plaintiffs is not disputed, and it is admitted that they were sold by the defendants as just stated. The defendants' position is that the corporation, without the word "limited," could lawfully

have been created for the real purposes and business of its organization, viz.: building and operating a railroad, a sugar refinery, and could own a store as incidental for the purpose of supplying the employees engaged by the company. The position, as stated, may perhaps be correct, but we do not think it entirely covers the issue of fact. As we appreciate the evidence the sales were not limited to the employees.

One of the witnesses, a commercial traveler, testified that the merchandise sold by him to defendant consisted of dry goods, notions and other articles, and he saw dry goods sold to ladies.

Another witness, who was at times employed by the defendants, testified that he bought for cash for his own use at this store.

We do not infer from his testimony that he was always employed on the plantation when he made his purchases. He says that the defendants kept an assortment of groceries, hardware, tinware and dry goods; that they were sold to the public, as well as to the employees.

This testimony was, in every particular as to its being a public store, corroborated by two other witnesses, who, themselves, bought from the store when not employed by the defendants.

Defendants' clerks were not called as witnesses by their employers. One of the witnesses for the defendant, in general terms, without any direct reference to the details of the business, contradicts the evidence for plaintiffs, as to its being a store open to all comers.

The defendants aver that the store was a commissary department of the enterprise.

The plaintiff denies.

The burden of proof is with the one who seeks to support his case by a particular fact; when that fact lies more particularly within his knowledge. Best on Evidence, Sec. 275.

The rule is not without the exception, as is shown by the following:

"I have always understood it to be a general rule that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative is to prove it, and not he who avers the negative."

But in *Elkin vs. Sanson*, 18 M. and W. 655-662, the judge on this *dictum* said: "I doubt, as a general rule, whether these expressions

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are too strong. They are right as to the weight of the evidence, but there should be some evidence to start it in order to cast the onus on the other side." *Ib.*, Sec. 300.

The evidence was positive that it was a store at which goods were sold to the public, and sufficient at least to shift the burden of proof, and render it necessary that the defendants should, through their clerks and other employees, prove needful facts in support of their contention, particularly within their knowledge. Best on Evidence, Sec. 275. Act No. 102 of 1880.

This brings us to a consideration of the general statute authorizing the formation of corporations, for the constructing of railroads, and for opening and maintaining other enterprises. That statute does not apply to merchandising. Merchandising is the only question before us. We have naught to do with the railroad and agricultural enterprises, properly organized we will assume under the terms of the statute. The mercantile affairs are all that concern us. They could not be conducted by a corporation organized under the statute in question. It was prohibited.

In view of the (in effect) clearly expressed prohibition the defendants could not under that statute claim corporate existence as to the merchandising.

ACT NO. 36 OF 1888.

We are led from the argument to believe that the defendants claim to have acted, in so far as relates to merchandising, under the more recent general statute of 1888.

The act authorizes the formation of corporations for certain purposes and requires a name to be selected.

In the section following, the word "limited" is made part of the name.

Evidently that word was not added by the defendants owing to the want of ordinary care or prudence in organizing. The omission of the word, the law reads, shall render also every person participants in such omission liable for any indebtedness, damage or liability therefrom. The Legislature has power to impose, under the limitations, any condition upon the enjoyment of the franchise, which the General Assembly deemed necessary or to the public good.

In all the laws relating to the subject the General Assembly requires a name, and the most recent statute requires that the word

"Limited" shall be the last word. They also require that the act of incorporation shall be recorded. In the case here, unless the last word is used as authorized by the act of incorporation, it would serve no purpose to use it in business.

The failure to insert the word intended, as a note of warning, is a technical error, which, under the terms of the statute, affects the interest of the directors.

The statute has made it a condition precedent to corporate existence. It is not a law peculiar to Louisiana. Joint stock corporations are partnerships except in form. The rights and liabilities of partners under the English statutes, substantially similar, were discussed by Justice Lindley ("Treatise on the Law of Partnership") in this connection, and he says that although intending to form a limited partnership, the parties may unknowingly so act as to make themselves liable to third parties as general partners.

The State of New York has a similar statute, and the use of the word "limited" is required; the penalty is very much the same as it is here.

The last statute, Act No. 36 of 1888, was preceded by legislation prohibiting corporations from merchandising.

The laws in regard to partnership, hedged in partnership ventures with restrictions. Thus a universal partnership could not be created without writing signed by the parties and registered. C. C. 2834.

The partnership in *commendam* required for its existence a written act recorded, otherwise the parties in *commendam* are personally responsible. C. C. 2845.

Under the influence of the laws, the legislator was conservative, and incorporated in the last statute, 1888, the conditions precedent to corporated existence and limitations found in the general laws upon the subject in other States, as well as in England.

The appellants have sworn that they did not know that the word had been omitted from the act of incorporation.

Mr. Bigelow, p. 349 of his work on Estoppel, says: "Directors of corporations being bound to know the proceedings of the body, can not escape an estoppel by the allegation of ignorance."

The defendants urge that the State alone can question corporate existence. That may be in cases in which it is sought to have a charter forfeited, but here the suit is to enforce the personal liability of officers of a corporation for corporate debts which they have

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incurred, because of their violation of the general statute. It may be maintained by creditors without direct proceeding taken at the instance and in the name of the State. The State has no interest in the indebtedness, and no reason arises, in consequence, requiring her intervention in the matter.

ESTOPPEL.

Lastly, it is argued that the plaintiffs are estopped. Estoppels by conduct and by record are pleaded. In our opinion neither applies. It is not shown that with knowledge of the irregularities, the plaintiffs agreed to sell goods to the corporation, or with that knowledge, they did some act showing acquiescence. They would not be benefited by these sales—on the contrary, they would be losers if they were estopped. The possibility of recovering their own (an amount justly due), is not the benefit, as we understand, to which reference is made in a number of authorities in holding that neither party will be heard to allege the invalidity of a corporation while retaining its fruits. In the courts of this State the decisions held that shareholders and mortgage debtors can not defend themselves against a claim on such contracts in a suit by the corporation by alleging irregularity in the organization. That by making a contract, for instance as a mortgage to secure the payment of a promissory note, the mortgagor precludes himself from questioning the fact of the proper organization of the corporation. It was decided that the defendant was estopped when the defence was in its nature unconscionable.

The plea of estoppel has never been applied to the creditor of a corporation seeking the payment of his claim. In one case the debtor has received a benefit that estops him; in the other the creditor has sued to recover an amount due by those who have failed to avail themselves of the terms of the statute.

The motion to vacate the receivership made in the United States Court contains no allegation which cures the absolute informality in question.

Substantially the informality was alleged, and although not followed by averments setting forth the indebtedness arising because of the informality, plaintiffs are not concluded.

The motion did not, have the effect of releasing any of the debt-

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ors. There is no ground to presume a release, either because of the action as a whole, or because of any of the allegations contained in the motion.

EQUITY.

If there has been any hesitation on our part in reaching a conclusion, it was after giving consideration to thoughts quite suggestive and prettily expressed by counsel in referring to the spirit of equity of modern jurisprudence, which they invoke as having sought to have justice, pure and simple, administered between man and man; which has sought to rise above matter of form, to keep abreast the advance of other sciences, and to make the law loved rather than feared. It was forcibly said at the bar that the law has bidden adieu to the era of snares and traps into which the innocent and unwary could be led to their own undoing. Everywhere equity is predominant. These are appealing thoughts. But if the law has determined a matter with all its circumstances, equity can not intermeddle.

We have seen that the statute is, in terms, mandatory and provides the penalty in case of non-compliance. If we were to leave the plain letter and the spirit of the statute, as we understand it, and be governed entirely by considerations of equity, the case would not be entirely with the defendants.

In organizing, or rather attempting to organize, they must have created the belief that under their management obligations would be discharged.

The evidence discloses that in good faith the defendants were disappointed, and that the failure to meet obligations was owing to unforeseen causes. None the less, those who seek to recover their own from the disappointed and unfortunate are not always, and under all circumstances, without some equitable rights.

Returning to the doctrine of estoppel, we conclude by quoting from *Eaton vs. Wilker*, 43 N. W. Rep.

"Hence if an organization is completed where there is no law, or an unconstitutional law, authorizing an organization as a corporation, the doctrine of estoppel does not apply," and by adding that these considerations must apply with greater force to corporations organized in disregard of the plain letter of the statute, and of the penalty imposed for its violation.

The judgment appealed from is affirmed.

State ex rel. Railroad Co. vs. Assessors et als.

No. 11,963.

48 1156
110 630

CHAMBERS ROY & CO., LIMITED, vs. S. A. KNAPP ET AL.

The debtors' note given for an open account does not necessarily novate the debt.

APPPEAL from the Twelfth Judicial District Court for the Parish
of Calcasieu. *Fournet, J.*

Arsène P. Pujo for Plaintiff, Appellee.

D. B. Gorham, T. T. Taylor and Saunders & Miller for Defendants,
Appellants.

Argued and submitted February 10, 1896.

Opinion handed down February 24, 1896.

Rehearing refused June 25, 1896.

The opinion of the court was delivered by

BREAUX, J. The facts are similar to those in the case of *A. Lehman & Co. vs. S. A. Knapp et als.*, ante, p. 1148, save that the plaintiffs held notes representing defendants' indebtedness to them. The acceptance of a note is not deemed a payment or novation unless the parties so agree.

It follows that if a corporation becomes indebted at a time when those who organized it are in default in not properly indicating, as the State requires, that it is a company limited, they are liable personally and are not discharged by the fact that their creditors accepted their note.

The judgment is therefore affirmed.

No. 12,073.

48 1156
51 340
51 432
51 1267

STATE EX REL. ST. CHARLES STREET RAILROAD COMPANY vs. BOARD
OF ASSESSORS ET ALS.

Under the statute the earning capacity of the plaintiff company forms a basis for estimating values.

The assessment was made by taking gross earnings and deducting therefrom the cost of operating the road.

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Held, that payment of debts secured by bond and mortgage of a date long anterior was not a running annual expense; that under the terms of the statutes it was not deductible from the gross annual earning of the year, to fix the net earning and the consequent value at the time, of the franchise. Franchisees are property (32 An. 915; Board of Liquidation vs. City of New Orleans; Railroad Co. vs. Delamore, 34 An. 1228; New Orleans, Spanish Fort & Lake Railroad Company vs. Delambre and Another, 114 U. S. 506; City of New Orleans vs. Railroad Company, 40 An. 698; New Orleans City & Lake Railroad Company vs. City of New Orleans *et als.*, 44 An. 1055), and amounts applied from the gross receipts to the payment of property bought many years prior, are taken account of in fixing net revenues.

The franchise was bought for cash; the amount needed to this end was borrowed at the time, and is now bonded and paid from year to year. These past liabilities are not annual expenses of operation, lessening annual revenue. The liability on property does not, in assessing, constitute an offset.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard J.

Harry H. Hall for Plaintiff, Appellant.

W. B. Sommerville, Assistant City Attorney, and *Samuel L. Gilmore*, City Attorney, for Defendants, Appellees.

Submitted on briefs June 6, 1896.

Opinion handed down June 15, 1896.

Rehearing refused June 29, 1896.

The opinion of the court was delivered by

BREAUX, J. The relator, alleging that it had made application to the Board of Assessors to reduce its assessment, also to the committee of the Common Council on the revision of assessments for a reduction of its assessment, sued for a writ of *mandamus* against the Board of Assessors to reduce upon the assessment rolls for the State and parish, for the year 1895, the assessment of its franchise from eight hundred and sixteen thousand and two hundred dollars to five hundred and sixty-six thousand dollars.

The facts are that the plaintiff paid three hundred thousand dollars cash for its franchise. It afterward issued bonds for this amount payable annually, at the rate of fifteen thousand dollars.

State ex rel. Railroad Co. vs. Assessors et als.

The dividends for 1894, a basis for the assessment of 1895, was.....	\$42,752 00
Amount paid on the bonds.....	15,000 00
	\$58,752 00
On a principal at 6 per cent. of	979,200 00
There was deducted other property, in regard to which no issue is raised	163,000 00
Balance.....	\$816,200 00

The claim of the relator is that there should be deducted from the last amount, as not subject to taxation, the sum sufficient to produce the fifteen thousand dollars used in redeeming bonds, redeemable each year, viz.: two hundred and fifty thousand dollars, leaving for assessment, balance of five hundred and sixty-six thousand two hundred dollars.

In other words, the relator claims that the annual payment of fifteen thousand dollars on its bonded debt is a running expense of the road, and contends that it should be deducted in determining the earning capacity of the road.

The respondents, on the other hand, contend that the amount of dividends paid by the company to the shareholders, *plus* the amount paid on the bonded debt, is the earning capacity of the road.

An unimportant clerical error was corrected by the District Court; save that correction the relator's application was rejected.

From the judgment the relator appeals.

The Board of Assessors is ordered, in assessing the franchise of a corporation, to take its earning capacity as a basis of value.

The word "earning" in the statutes is a broader term than "the amount of dividends paid by the company to the stockholder."

Of course, in determining the proper assessment of a corporation such as plaintiff, the running expenses are to be deducted; they, however, do not include an amount to redeem outstanding bonds. In the matter of assessments these bonds have naught to do with the value of the property. If they had, a corporation buying a franchise for cash would be at greater disadvantage than a corporation buying for cash and afterward issuing bonds for the amount of borrowed money paid for the franchise. An indebted corporation for such bonds would always be in a better situation as to assessment; although generally under the assessing statutes, debts are not deducted in determining the assessment. The franchise is as valuable to a corporation owing bonds as it would be to one not indebted on bonds.

Moreover, this indebtedness at first was not an annual indebted-

State ex rel. Railroad Co. vs. Assessors et als.

ness. The plaintiff was the adjudicatee of the franchise for an amount in cash.

To meet the requirement of the adjudication an indebtedness was incurred the year that it became the adjudicatee; it is no part of the running expenses of years subsequent.

In the cases heretofore decided by this court, to which our attention is directed by plaintiffs' counsel, the assessment was measured by the amount of dividends paid to the shareholders. There was no question of other amounts earned applied to the payment of bonds securing the indebtedness of a previous year. That question did not arise in the argument at the bar or in the discussions of the court. "Net earnings" are defined substantially, in *Union Pacific R. R. Co. vs. U. S.*, 99 Otto. 402, 428, and in *U. S. vs. Kansas P. R. R.*, *Ib.* 455, 460, as the surplus of the transportation earnings above operating expenses.

The phrase has also been defined in a general way as the excess of the gross earnings over the expenditures in producing them, less the expenditure of capital laid out in constructing and equipping the road.

Under each definition each year stands by itself. We do not think that they cover, as an amount to be deducted from the gross receipts, an indebtedness of a prior year.

The company is not, as contended, paying taxes upon a debt it owes, as urged by counsel for relator, but upon the value of a franchise, as shown by dividends and payment on its bonded indebtedness. They are its earning capacities, not affected by present loans to capital account of many years prior.

Under the terms of the statute we think the judgment should be affirmed.

It is affirmed.

ON APPLICATION FOR REHEARING.

BREAUX, J. After having reconsidered the points involved in this case, and after having carefully read the elaborate brief of energetic counsel, we are still of the opinion that the bonded indebtedness of the company, which represents the purchase price of their franchise and dates a number of years ago, is not, as to the annual payment of interest on this debt, a part of the annual necessary expenses of the business.

Lacassagne vs. Abraham.

The earning capacity of a company is not such an amount as remains after payment of the whole debt of the company or a part.

It is the excess of receipts over expenses.

To illustrate: Upon property largely encumbered large annual profits may be made, and for this reason it must have considerable value.

The value is not, or should not be, affected by prior indebtedness incurred.

It may be a hardship upon this and other similar companies to make the earning capacity the basis of value of the property assessed, instead of taking the market value of the stock. A consideration of that view is not within our jurisdiction. The remedy is within the legislative, and not the judicial control.

As relates to the value of the stock, the facts do not place that question before us for decision.

The case was tried with reference to the earning capacity of the road as establishing value.

Payments of the debts of the shareholders does not affect the value.

Under the statute the limited life of the franchise, if it does not affect the value of the property, is not good ground to reduce the assessment. Rehearing refused.

No. 11,970.

LAURENT LACASSAGNE vs. H. ABRAHAM.

The creditor, in good faith, acquiring his mortgage from the recorded owner, is not affected by the fraud of the vendor or vendee practised in the conveyance of the title. 11 La. 408; 4 An. 83, 286; 1 An. 286; 2 H. D., p. 1878, No. 1.

The right of such mortgage creditor to seize and sell the property is not affected by the suit of the wife of the vendor to annul the sale on the ground it was a fraud on her rights, the suit being directed not against the mortgage creditor, but only against the reputed heir of the husband. *Ibid.* and 45 An. 1085; 47 An. 49.

The article of the Code forbidding alienation of the property pending the suit has no application to a valid mortgage created before the suit is brought, or to a sale under that pre-existing mortgage. C. C., Art. 2459; Act No. 3 of 1878. Nor can the judgment in such suit be pleaded as *res judicata* against such mortgage creditor no party to the suit. C. C., Art. 2286.

A PPEAL from the Seventeenth Judicial District Court for the Parish of Vermillion. *Allen, J.*

48 1160
49 140

48 1160
51 645
51 843

48 1160
52 2058

48 1160
106 689

48 1160
110 255

48 1160
113 590

48 1160
118 987

Lacassagne vs. Abraham.

D. Caffery & Son and W. S. Benedict for Plaintiff, Appellant.

Conrad Debaillon, Dinkelspiel & Hart, Chrétien & Suthon and Albert Voorhies for Defendants, Appellees.

Argued and submitted December 19, 1895.

Opinion handed down March 23, 1896.

Rehearing refused June 25, 1896.

The opinion of the court was delivered by

MILLER, J. This appeal is by plaintiff from the judgment dismissing his suit, asserting title to property accompanied with an injunction to maintain his possession sought to be disturbed by a seizure and sale under the writ issued in the suit of one of the defendants against F. Chapuis, the petition alleging that the property of defendant is no manner bound for the defendants' judgment on which the writ issued.

The property in controversy was acquired by Jean B. Cavallhez in 1869. The record shows a donation by Cavallhez and his wife Ernestine Diaz, to their daughter Marceline, made in contemplation of her marriage with Clark H. Renick, followed soon after by the sale of the property to him for fifteen thousand dollars, duly registered. Cavallhez and his wife died; he in 1882, and Ernestine Diaz before. C. H. Renick died, and at the sale of the property of his succession, his widow, Marceline, in 1883 acquired the property purchased by her husband from Cavallhez. Soon after she mortgaged the property to Albert S. Maxwell, and failing to pay the debt, Maxwell instituted suit on the 21st May, 1885, seized, sold under his writ and became the purchaser, with plaintiff Lacassagne, of the property at the sheriff's sale on the 15th August, 1885. Lacassagne afterward bought Maxwell's one-half interest, thus becoming owner of the whole property. All these titles and the mortgage to Renick were duly recorded.

In 1884, fifteen years after Cavallhez' sale to Renick, and subsequent to the purchase by Mrs. Renick and her mortgage to Maxwell, a suit was brought in the United States Court for the Western Dis-

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trict, by Mrs. Jean Cavailhez, alleging herself to be the wife of Jean B. Cavailhez by the marriage she claimed to have been contracted in France in 1833, and seeking to recover the property conveyed by Cavailhez to Renick in 1869. The averments of her bill were, substantially, that the alleged marriage of Cavailhez and Ernestine Diaz was void; that the property involved in this controversy, acquired during the marriage, fell into the community; that the sale from Cavailhez to Remick was designed to defeat her rights as the wife of Cavailhez, by transferring the property to the issue of "the unlawful wife;" that the price stated to have been paid by Renick was never paid, but consisted, in fact, of the amount settled in dowry by Cavailhez on his daughter; that the donation and sale were in *fraudem legis* and void; the bill further averred the indebtedness of Cavailhez to the oratrix for her separate funds, received by him in France, for which she had the legal mortgage of the wife on her husband's property, and contained the usual charges of bills in equity, of combination and conspiracy of Cavailhez, Ernestine Diaz and her daughter, Mrs. Remick, to deprive the oratrix of her rights. It will be perceived that the only survivor of those whose acts were arraigned in the bill was Mrs. Remick, the sole party defendant, and process against her was prayed in her capacity of tutrix of her minor children, and as administratrix of Remick's succession and individually. The prayer of the bill was for the recognition of the oratrix as the widow of Cavailhez; that the property be decreed that of the succession, subject to her right to one-half; that the marriage between Cavailhez and Ernestine Diaz be decreed void; that the sale to Remick be annulled, and finally that the debt claimed by the oratrix, for her funds received by Cavailhez, be recognized, with legal mortgage on his half of the property. The suit resulted in the decree on January, 1886, recognizing the oratrix as the widow of Cavailhez, and her rights as such; the decree annulled the sale to Remick; the donation by Cavailhez to Mrs. Remick, recognized the debt and mortgage claimed by the oratrix, and adjudged she should be put in possession of the property.

Soon after this decree Mrs. Cavailhez, thus recognized as the wife of Cavailhez, died, and by last will instituted F. Chapuis her heir. Then followed a suit in the nature of an ancillary bill in the United States Circuit Court by Lacassagne to protect his possession, but that failed by a dismissal on appeal to the United States Supreme Court

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without prejudice to his action at law. While that suit was pending Chapuis conducted a proceeding in the State Court, by which he claimed to become owner of the undivided half of the property, which, with the title claimed under the bill, he made the basis of the debt and mortgage he contracted to Abraham & Son, the present defendants, who in 1895 purchased under their foreclosure. Lacassagne, remitted by the decree of the United States Supreme Court of March, 1892, to his action at law, instituted his present suit in 1893, directed against Chapuis as well as Abraham & Son.

We have gone over the facts presented in the record, because to some extent, at least, they serve to illustrate the issue, and have been discussed in the argument. But in our view the issue is very narrow. The case comes here on the question only of *res judicata*. We find it unnecessary to discuss the question so elaborately argued, of the jurisdiction of the United States Circuit Court to render the judgment on which the exception is based of defendant, Mrs. Cavailhez.

The argument to sustain the exception of *res judicata*, or rather estoppel, as it is termed in the briefs, rests on the principle announced by our Code that the property claimed in the suit can not be alienated pending the litigation, and the prohibition extends to suits for the enforcement of mortgages as well as petitory or possessory suits. Civil Code, Article 2453; Act No. 3 of 1878. There is no question in our minds that the suit of Mrs. Cavailhez was of a character to forbid any alienation during its pendency. But the difficulty of the defendant's case is whether there was any alienation in the meaning of the law of this property during the suit of Mrs. Cavailhez. There was no mortgage or sale other than the seizure and sale under the Maxwell mortgage. But that mortgage, given by one whose ownership was based on the titles spread for more than fifteen years on the public records, was created in 1883 before the suit of Mrs. Cavailhez was brought, her bill having been filed in May, 1884. The sale that occurred after the suit, was the sequel and enforcement of the pre-existing mortgage, which for all purposes of this discussion is to be deemed good and valid, not assailed by pleadings or proof, unless it is contended there was no power in Cavailhez to sell or in the purchaser under him to mortgage. In this view then, before the pretensions of Mrs. Cavailhez were made known by any suit, the property was charged with the mortgage conveying the

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right to seize and sell. Under that pre-existing mortgage plaintiff holds.

All concede the principle announced by the Code, prohibiting alienations *pendente lite*, but has the principle any application to this controversy. Cavalliez was the unquestioned owner of this property in 1869. Married or not, he had the power to sell. He conveyed to Remick; Remick dying, his widow acquired at the succession sale. These titles were of record, and on the faith the law gives to recorded ownership, Mrs. Remick obtained Maxwell's money and gave him the mortgage in 1883. It needs but the statement that the mortgagee who in good faith loans his money on the basis of the recorded ownership, acquires a right not capable of being affected by any fraud of the owner in conveying title. In a leading case the court, dealing with a mortgage by the recorded owner in maintaining the mortgage against the children assailing as fraudulent the title made by their father to the party, who on the strength of his ownership, mortgaged the property, used this language: "Had the recorded owner sold to a third person ignorant of the fraud of the vendee, it can not be doubted the title of the purchaser would have been good; a mortgage is in the nature of an alienation, and the mortgage creditor with no knowledge of the fraud would be equally protected. *Foster vs. Foster*, 11 La. 408; *Stockton vs. Craddick*, 4 An. 286; *Boudreau vs. Bergeron*, 4 An. 83; *Richardson vs. Hyams*, 1 An. 286; *Thompson vs. Whitbeck*, 47 An. 49; *Broussard vs. Broussard*, 45 An. 1085. Thus before the institution of the suit of Mrs. Cavalliez, Maxwell had acquired his mortgage and the right to seize and sell the property for payment of the mortgage debt. That right he exercised and the plaintiff, Lacassagne, is a purchaser under that mortgage. Is it to be maintained that this pre-existing vested right could not be exercised, but was defeated by the subsequent suit of this lady asserting rights under a marriage never known to the public, as we gather from the record, and claimed to have taken place in France more than fifty years before her suit? The article of the Code that the property sued for can not be alienated, pending the suit, is not to be construed so as to divest rights acquired before the suit. Such construction would bring the article in palpable conflict with the protection accorded to vested rights. If Maxwell had no power to seize and sell under his mortgage, because of the institution of this suit, brought after his mortgage was created, then his contract right was

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utterly destroyed by no act of his: by an adjudication to which he was no party, and made in a litigation of which he could have no notice when he acquired his right, because the litigation was begun after that right was vested. The law deems all are apprised of pending suits, and any one who buys or takes a mortgage on property after the suit is begun acquires with notice, and consequently subject to such judgment as may be rendered in the suit. All can appreciate the operation of that rule announced in the Code, but the other proposition challenges prompt dissent that a right acquired is destroyed by the subsequent institution of a suit, of which there could be no notice when the third person acquired his title or mortgage. The line of authority cited by the defendants make the obvious application of the article of the Code forbidding alienations pending the suit for the property. The decisions refer to rights on property sued for, attempted to be created after the suit is brought. *Barelli vs. Delassus*, 16 An. 281; *Taylor vs. Pipes*, 24 An. 552, and others of the same type. The mortgage in this case, created before, could not be deemed affected, because of the subsequent suit and judgment, not directed against the mortgage creditor. But yet it is claimed the right conferred by the mortgage is swept away by that suit. The enforcement of the mortgage is the assertion of the pre-existing right, and a sale under that mortgage under which plaintiff holds is, in our view, entirely without the scope of the article of the Code. This view, as we think, the fair interpretation of the Code, has been sustained in previous decisions cited. In our opinion the exception of *res adjudicata* should have been overruled.

If the sale by Cavalliez was a fraud on his wife and Maxwell, the mortgage creditor and the plaintiff holding under him are implicated in the fraud that would furnish a basis for relief to plaintiff. The case as presented here admits of no determination of that issue, and on that as on all questions, save that arising on the exception of *res judicata*, we give no opinion.

It is therefore ordered that the judgment of the lower court sustaining the exception of *res judicata* be avoided and reversed, and the case be remanded for trial on the merits.

DISSENTING OPINION.

BREAUX, J. I do not think that the plaintiff, who alleges that he is the owner of the property (in so far as appears of record in this case),

State ex rel. Railroad Co. vs. Judges et als.

was a purchaser without notice, either actual or constructive, of the claim of Jeanne Cave, widow of J. B. Cavailhez.

I am not prepared to agree with the proposition (with the evidence legally before us), nor does the opinion of the court, as I appreciate, so determine, that a fraud was practised by plaintiff in the case of Cave, widow, against her husband in order to bring about the exercise of jurisdiction by the United States Circuit Court. Neither am I inclined to the opinion that the plaintiff can invoke the fact in his behalf that the succession of Cavailhez was not, in name, a party to the suit brought to recover the alleged rights of Mrs. Cave, widow Cavailhez, as the issues were before the court in that case contradictorily with those under whom plaintiff claims to hold, and as against whom the title was annulled by a judgment which is not void, however voidable it may be.

I therefore respectfully dissent.

— — — — —
No. 12,155.

THE STATE EX REL. THE NEW ORLEANS, FORT JACKSON & GRAND ISLE RAILROAD COMPANY VS. THE JUDGES OF THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT ET ALS.

Writs of prohibition and *certiorari* will not issue when the proceedings of the lower court sought to be reviewed and arrested are ended.

ON APPLICATION for a Writ of Prohibition.

— — — — —
James Wilkinson (E. Howard McCaleb of Counsel), for Relator.

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Edward N. Pugh for Respondents.

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Submitted on briefs April 23, 1896.

Opinion handed down May 18, 1896.

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APPLICATION FOR WRITS OF CERTIORARI AND PROHIBITION.

The opinion of the court was delivered by

MILLER, J. We are called on in this case to direct the writs of prohibition and *certiorari* to the Circuit Court restraining any further

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proceedings on the appeal in the suit of the Relators vs. Commissioners of the Lafourche Basin Levee District, and as part of the relief claimed by the relators, we are asked to annul the judgement of the Circuit Court in that suit.

The petition of the relators in the District Court, parish of Plaquemines, alleged in substance they had constructed a railroad lying partly within the Lafourche Basin Levee District and not over sixty miles in length; that under the Act No. 19 of 1894 the assessments of the board were limited to fifty dollars per mile on short roads of the character of that of petitioner; that this act applied to all assessments becoming due after the passage of the act; that notwithstanding the board sought to enforce an assessment for the year 1894 on petitioners' road at the rate of one hundred dollars per mile, prescribed by the act claimed to have been superseded by that of 1894, and the petition prayed that the assessments be decreed exigible to the extent only of fifty dollars per mile, and that the act be adjudged binding upon that Levee Board.

The suit in the District Court progressed to judgment in favor of the plaintiffs, the Railroad Company, and was appealed to the Circuit Court. The court, *ex proprio motu*, dismissed the appeal on the ground the pecuniary amount involved excluded the jurisdiction of the Circuit Court, but, on rehearing, maintained its jurisdiction and reversed the judgment of the lower court. Thereupon the Railroad Company, on the application for the rehearing, urged that the controversy involved the legality of a tax on assessment, and the Circuit Court had no jurisdiction because of the character of the question. Constitution, Art. 81. The rehearing was refused. From first to last in the Circuit Court there was no suggestion of the want of jurisdiction by reason of the nature of the controversy until the rehearing was asked by the company. The appropriate mode of raising that question was by motion to dismiss the appeal on that ground. But with no such motion or suggestion of the objection to the jurisdiction until the Circuit Court had heard, decided, granted a rehearing, and again decided, the case is here on the application for writs of prohibition and *certiorari* to review the proceedings of the Circuit Court, annul its judgment and prohibit its further action.

The application, in our view, comes too late. The action of the Circuit Court complained of, not sought to be arrested while in progress, is now completed. The last act of that court was to refuse

Johns et als. vs. Race.

No. 12,077.

ANDREW H. JOHNS ET ALS. VS. GEORGE W. RACE.

Where parties to a partition proceeding, although it was not definitely closed, have acquiesced in it for nearly thirty years, the heirs of the original parties to the suit can not revive it and continue the partition proceeding.

If the proceedings show that the defendant in the suit has a claim against plaintiffs on final settlement, and he made no demand for it in having it judicially recognized, and he died many years after, in the suit by plaintiffs to continue the partition the claim of the heir of defendant in reconvention for said amount will not be allowed, for the reason the long silence of defendant presumes an abandonment of the claim.

ON APPLICATION FOR REHEARING.

The case was remanded for liquidation and partition under the instructions of the court as to certain items and reservation as to others.

As to one of the items it was not contested, but admitted. In partition proceedings it is not excluded from the partition.

The inventory taken after the case had been remanded, not questioned as to its correctness, is *prima facie* evidence in support of that item.

To the extent and amount that the defendant was a creditor and debtor, by operation of law one extinguished the other, and there was no prescription.

Prescription applies to the remaining balance unclaimed since many years, and to all appearances treated as a balance after partition.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

John T. Whitaker and Ernest T. Florance for Plaintiffs, Appellants.

Merrick & Merrick for Widow and Universal Legatee, Defendant,
Appellee.

Argued and submitted April 11, 1896.

Opinion handed down April 20, 1896.

Rehearing granted May 4, 1896.

Opinion on rehearing handed down June 22, 1896.

The opinion of the court was delivered by

MCENERY, J. The plaintiffs are the sole heirs and surviving representatives of the plaintiff in suit of *A. J. Johns et al. vs. G. W. Race*, 18 An. 105. In that suit the defendant had instituted his widow his universal legatee. The plaintiffs sued to reduce the

Johns et als. vs. Race.

legacy to two-thirds and to annul it for one-third, as the deceased left her mother, who had died before the institution of the suit, as her forced heir. The petitioners averred that the estate of the deceased wife consisted of the sum of five thousand dollars (\$5000), received by the husband from her father's estate, and in the additional sum of six thousand dollars, with interest coming from the same estate, and by her mother as her natural tutrix; her half in the community which existed between her and her husband, and two lots and improvements therein, and in money and personal property. They prayed for a partition between them and the defendant, of all property belonging to the succession of the deceased wife. The decree was that the plaintiffs be recognized as the heirs of the deceased wife; that her last will and testament be annulled so far as it disposes of more than two-thirds of the property of which she died possessed, and that the two lots of ground, together with the improvements as they existed on the same at the time of the death of defendant's wife, be declared to belong to the community; that defendant's rights to improvements which he had placed on the property since the death of his wife was recognized and reserved to him; that the defendant's account in the liquidation and partition of the succession of his deceased wife for five thousand dollars (\$5000) with legal interest from the 15th March, 1853, and for the further sum of seven hundred and seventy-eight dollars and fifty-nine cents; reserving to the plaintiffs any right they may have to other property, rights and credits, not specially mentioned in the decree. A liquidation and partition was ordered of the succession of the deceased wife and the community which existed between defendant and his wife. The case was remanded to be proceeded in according to law and in conformity to the decree of the court. The party presently defending is the surviving widow of the second marriage of Geo. W. Race who was the defendant in the former controversy. She went into possession of all the property left by her deceased husband. The present suit is for the purpose of having a final liquidation and partition. In the partition it is alleged the purchase of the two lots referred to in the decree of A. J. Johns vs. Race was null and void, but these allegations were withdrawn, and there is little left in the suit, except plaintiff's defence to the reconventional demand of defendant.

The prayer of plaintiff's petition is that after due proceedings

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there be judgment referring the matter in controversy to Nicholas B. Trist, notary public, for the purpose of effecting a liquidation and partition of the succession of the deceased wife of G. W. Race, late Sarah A. Jones, now held by Olivia C. Race, widow in indivision with plaintiffs, the said Olivia C. Race being entitled to two-thirds of said property and plaintiffs to one-third, all in accordance with the decree of the Supreme Court rendered in the case of A. J. Johns *et als.* vs. G. W. Race in 1866, and that the defendant be entitled to account in the liquidation and partition for one-third of the fruits and revenues of the real estate described in the partition from 1st January, 1866.

As between the parties to this suit the decree in Johns vs. Race is *res judicata*. The amounts to be paid to the succession of the defendant's wife were accurately and definitely stated. The right of the defendant to claim the value of improvements placed on the property was reserved. And the right to plaintiffs to demand other rights and credits was also reserved. Under the decree it was necessary to properly partition the property to have the same preceded by another inventory. This seems to have been recognized by both plaintiffs and defendants, for a motion for a new inventory was made by defendants' counsel and concurred in by the counsel of plaintiffs. What informalities, if any, there were in the inventory are cured by prescription.

The inventory prayed for was made. The lots were appraised as vacant lots, and the improvements placed on them since the death of defendant's wife were also separately inventoried and appraised. The lots were appraised at four thousand dollars; the improvements at thirty-six thousand dollars. The debts due by the husband to the wife's succession, as ascertained by the court, with interest added to the five thousand dollars, were placed on the inventory. "Claims and credits" amounting to seventeen thousand six hundred and eight dollars and sixty-six cents were also placed on the inventory.

A family meeting in the interest of the minor plaintiffs advised that the lots be sold for cash to effect the partition. On the first application of counsel for plaintiffs and defendants a decree was provoked, ordering the lots to be sold for cash. The defendant in the partition suit, George W. Race, purchased the property for twenty thousand dollars.

It seems after this sale nothing was done in further prosecution of

the partition. The reason for this inaction, we think, is fully accounted for by the fact that on the final liquidation the plaintiff would be indebted to the defendant. All parties lost interest in the proceedings. George W. Race, the defendant, took no steps to have the indebtedness to him to be judicially recognized, thus exhibiting a willingness to give the plaintiffs the benefit of his claim against them. All parties to the original suit are dead. They seem to have settled all the differences before death. They abandoned the suit and rested with acquiescence, if not satisfaction, upon the logical showing of facts and figures on the inventory. The decree in the first suit was in 1866. The heirs of the plaintiffs in that suit filed the present suit in 1894. The defendant in that suit, who died in 1881, evidently never had any intention of enforcing his claim against plaintiffs. The District Judge, who knew him, speaks of his generous and magnanimous nature, and members of the court can confirm this estimate of the deceased's character.

Under the facts of this case we do not think it would be just to the memory of the deceased to allow the demand in reconvention. It would have never been made, we are assured, but for the suit of plaintiffs. The demand in reconvention is stale and the probabilities are that both plaintiffs and defendant in the original suit had settled their differences by tacit consent, to which long silence and inaction have given the force of a positive agreement.

The judgment is amended so as to reject the reconventional demand of defendant; in all other respects it is affirmed.

MR. JUSTICE MILLER concurs in the decree.

ON APPLICATION FOR REHEARING.

BREAUX, J. The plaintiffs and intervenor abandoned their demand to have the probate sale to the late G. W. Race declared null.

All questions relating to the title of the property bought at that sale are settled.

The remaining issues relate principally to an amount claimed by defendant as due by the plaintiffs.

The claim originally was not disputed by plaintiffs. It was submitted in pleadings, by which they are bound, as an amount for which they were indebted.

A decree of this court was pleaded as an estoppel, and as *res judicata*.

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The proposition does not admit of discussion; an issue properly determined operates as a bar to any further consideration of the subject.

In the petition for the judgment pleaded as *res judicata* the plaintiffs admitted their indebtedness, or rather the indebtedness of their mother, to the defendant from whom they inherited, while in the petition they claimed certain items as due to them by the defendant.

The answer in that suit did not traverse plaintiffs' allegation admitting their indebtedness. The defendant denied his indebtedness; nothing more. This was the issue tried and decided. No reference was made to the admission, and no part of the admitted amount was incorporated in the decree. The judgment is absolutely silent as to the claim. The court did not give a judgment for the amount, nor was it on the other hand rejected.

Without pleading in point, without an issue raised, in partition proceedings, in which there are many items, we do not think that *res judicata* applies. It must be borne in mind that this was not a contested claim, and that the admission was in the interest of the one against whom the judgment is now placed as *res judicata*.

In the decree, pleaded as the thing adjudged, the court reserved to plaintiffs, rights to other property, if any, they had. *Johns vs. Race*, 18 An. 105, 107.

In our decree in this case we held that the judgment operated as *res judicata*, referring to the issues pleaded, and finally decided, and not to an amount admitted by plaintiff as due and not passed upon by the court.

It is true that the plea of *res judicata* can be invoked in partition proceedings when the judgment decides the issues.

It does not follow that failure to fix a credit, upon the pleading and admission of a plaintiff, bars an action for an amount silently passed over, and which did not, in any respect, enter into the judgment.

The defendant can not be compelled to reconvene.

The principle is laid down by Mr. Bigelow in his valuable work on Estoppel, p. 185. His illustration is pointed in support of the proposition that the judgment is not conclusive, and that a remedy remains to secure the admitted amount.

The judgment pleaded as *res judicata* decreed a partition of the

property. To serve as a basis for the partition an inventory was taken in accordance with requirement of the decree. This debt to the succession due by the plaintiffs was inventoried. It is true that the partition was not made. But the inventory remained unquestioned. These many years the heirs have remained silent. It is true in the *proces verbal* of the inventory it does not appear that the heirs were made parties. Previous to the inventory, however, their attorney accepted service of the petition for the partition. It was treated as a correct inventory and offered in evidence without suggestion of error. A conclusive presumption supports its correctness. *Fink vs. Lallande*, 18 L. 547, 554; *Drouet vs. Rice*, 2 R. 374, 377. *Contemporanea expositio est optima et fortissima in lege*.

The plea of prescription is interposed on part of the plaintiffs as another bar to this claim of defendant. The sale of the property reduced the assets to cash or its equivalent.

The two debts to an equal amount are reciprocally extinguished—that is, the amount due by defendant on his purchase was extinguished by an equal amount due him by the estate, inherited by the plaintiffs. These successions had been accepted by the plaintiffs. The rights were inherited. The adjudicatee was indebted for the price. He was at the same time a creditor of the heirs of the succession. Extinction took place after these many years of uninterrupted acquiescence.

This brings us to the matter of the balance remaining due on the face of the papers after deducting the purchase price from the total found due to the defendant; an issue now pressed by the defendant. The interested parties seemed for many years, while all the witnesses were alive, to have considered everything connected with these successions settled. It is now a *fait accompli*, not, we think, to be lightly disturbed. The difference was established many years ago and must have been well known by the parties. The defendant must have known that an amount was due. For good reasons doubtless he did not choose to claim it. In our opinion the statute of prescription applies to this balance.

The defendant and appellee apprehends that our decree affects her title. This was not the intention and it does not follow from its terms.

In order to place the matter at rest our decree is modified so as to apply in rejecting the reconventional demand only to the amount

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claimed as due to the defendant after deducting his indebtedness from the total due him as before stated—*i. e.*, to money demands.

With this slight modification our original decree remains unchanged.

No. 11,986.

W. H. HENDERSON ET ALS. VS. CRESCENT INSURANCE COMPANY
ET ALS.

When an insurance company, under its contract, elects to repair and fails to do so and the assured completes the repairs, the insurance company is liable for the cost of the repairs without reference to the amount of the insurance.

The election to repair is a contract which can only be discharged by its performance or execution. Defects in the material in the original building will not excuse non-performance.

On Rehearing. NICHOLLS, C. J.: One contract may be more or less connected or dependent upon another; one might not have existed at all but for the prior existence of the other, and yet the two be legally separate and distinct. *Walker vs. Villavaso*, 15 An. 717.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Fenner, Henderson & Fenner for Plaintiffs, Appellees.

Denégre, Blair & Denégre, Carroll & Carroll, and Leovy & Leovy for Defendants, Appellants.

Dart & Kernan for Walther, Warrantor, Appellee.

Argued and submitted March 26, 1896.

Opinion handed down April 20, 1896.

Rehearing granted May 4, 1896.

Argued and submitted on rehearing June 15, 1896.

Opinion on rehearing handed down June 22, 1896.

The opinion of the court was delivered by

MCENERY, J. The plaintiffs took out policies of insurance in the defendant companies on a building in the city of New Orleans which they jointly insured. A fire partially destroyed the building. Each

policy contained a stipulation that it should be optional with the company to repair, rebuild or replace the property on giving notice within thirty days after receipt of proof of loss. The insurance companies elected to repair and replace the property. After commencing work they abandoned the same for the reason that a part of the building collapsed and fell, impairing the repairs which had been made, and doing other damage to the building; that afterward a storm blew down a portion of the rear wall, and the party wall was afterward condemned by the city authorities. There is a dispute as to whether the collapse occurred through the fault of the contractor employed by defendants, or whether it was caused by inherent defects in the original construction of the building. The defendants endeavor to escape liability on the ground of the inherent defects in the original construction of the building, and if, as contended by plaintiff, the collapse was through the fault of the contractor, they ask for judgment against him in the amount rendered for plaintiffs. He was cited as warrantor.

When the defendants abandoned the work, the plaintiff undertook the repairs. There was judgment in their favor for the amount thus expended, and their demand in the call in warranty was rejected.

The defendants filed an exception, alleging a misjoinder of parties plaintiffs and defendants, because there were separate contracts with each company, and that each insurance company was not a party to the contract made by the other, as each part owner of the property insured his interest in a separate company. Each contract stipulated to pay the loss, or to repair, rebuild or replace. They all elected to repair. Each could not repair one undivided part of the building. But if there was any force in the exception, it was avoided by the companies undertaking to repair, and employing, through an agent, one of the defendants, to repair for all.

The election to repair converted the contract of insurance into one of repairing, regardless of the amount of the insurance named in the policy, which ceased to be a rule, for damages. *Fire Assurance vs. Rosenthal*, 108 Pa. 476; *Morrell vs. Irving Fire Insurance Co.*, 33 N. Y. 429.

This principle has become so fixed by repeated adjudications that it has passed into the text-books as elementary. 2 *May Insurance*, Sec. 433; 7 *Am. and Eng. Ency. of Law*, p. 1053; 1 *Wood Fire Ins.*, p. 383.

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The defendants were in the position when they elected to repair as though they were contractors who had examined the building and made an estimate of the expense. No original defects in the building could possibly excuse them from doing just what they had agreed to do. It was to repair the building as it originally stood, and if there were defects in timber, weak walls, etc., it was their duty to have considered these matters before making the election. They can not be urged as defences for non-execution of the contract. If the obligations of defendants thus arise from an ordinary contract to build or repair, it would seem that it is even the more imperative when the contract has been substituted for the contract to indemnify the loss in money, as the contract of insurance is to fully indemnify the insured and to place him in as favorable a position as he was before the loss. This has been affirmed in many cases, and it has been often held that where a wooden structure is insured and partially destroyed, and a city ordinance forbids repairing and requires a brick building in place of the wooden one, the loss will be treated as a total destruction of the building. 2 May Ins., Sec. 433; Brady vs. N. W. Ins. Co., 11 Mich. 425; Ins. Co. vs. Garlington, 18 S. W. 337; Monteleone vs. Ins. Co., 47 An. 1568.

In 1 Wood on Fire Insurance, pp. 331, 332, it is stated, in speaking of the election to indemnify in money, or to rebuild or repair, "*which of these it will do it is optional with the insurer to choose, and when he has made his selection the contract becomes one to pay money, if he so elects, or to reinstate the property if he elects to do that without any reference to the expense of doing so.*" And on page 333 the same authority says: "*When the insurer elects to reinstate the property and gives notice thereof to the assured, it is held that he is not excused from doing so, because performance has become impossible. Nor will he be excused from paying the entire amount of the loss. An election to rebuild operates as a waiver of all defences, except fraud or mistake.*"

The testimony in the record shows that Walther, the contractor, used all necessary precautions to protect the building from falling when taking down the walls. The collapse evidently was caused by inherent defects in the building aggravated by the fire. It was originally improperly constructed, as the walls were not properly anchored, but it would have probably answered all purposes had it not been for the fire.

The testimony of the city officials, whose duty it was to critically examine the building, and who observed the precautions to prevent the walls from falling by Walther, we think is conclusive that he was not to be blamed. At any rate the evidence is so conflicting on some points where it is attempted by plaintiffs to prove that the contractor was at fault that no judgment could be rendered on the call in warranty against the contractor.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

NICHOLLS, C. J. The opinion heretofore rendered in this case proceeded upon the principle that although the insurance companies by electing to rebuild the damaged property, as they were authorized under their policies to do, transformed—in a sense—the insurance into building contracts. These contracts were of a kind in some respects essentially different from ordinary building contracts. That the obligation of the companies were much broader than those of simple building contractors, as the insurance or indemnity features of the original contracts were transported over and imported into the substituted or rather modified contracts resulting from election. So holding, it might well and consistently be that the companies should be held bound to the plaintiffs when the rights and obligations of parties took their origin in insurance contracts when they would have been absolved from liability had the initial contract been one for building.

On application for rehearing the court adhered to its views upon this branch of the case and declined to reopen the question as between the plaintiffs and defendants, though it did reopen it as between defendants and the builder, with whom they had contracted to do and who actually did the work. The effect of this final affirmance of our decree between the original parties has been to make the principle announced become fixed as the law of the case as to the original contracts.

The effort of defendants on rehearing has been to show that Walther, the builder, being fully cognizant of the relations between the plaintiffs and the defendants, and the resulting rights and obligations of parties, and having made his own contract with full knowledge of the same, he did so with reference to them and consented to be bound as between himself and the companies by the same

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obligations as were the defendants to the plaintiffs. We can not accede to that proposition. One contract may be more or less connected or dependent upon another; one might not have existed at all but for the prior existence of the other, and yet the two be legally separate and distinct. *Walker vs. Villavaso*, 18 An. 717. The responsibilities flowing from the one as between the original parties do not gauge the responsibilities of the others. We have to determine and measure the rights of the defendants and Walther by the immediate contracts which they made between themselves. By that test we see no reason to change our original opinion, and it must, therefore, remain undisturbed.

No. 11,739.

S. GUMBEL & CO. VS. ILLINOIS CENTRAL RAILROAD COMPANY.

Railroads using appliances in common use which have been used for a long time and found sufficient to protect their own and other property from danger, would be protected against the charge of negligence, because of its use. If such appliances are used the burden of proof is on plaintiff to show they were defective or improperly and negligently used.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

Saunders & Miller (S. S. Calhoon and Marcellus Green of Counsel)
for Plaintiffs, Appellants.

Farrar, Jonas & Kruttschnitt and Farrar, Leake & Lemle for Defendant, Appellee.

Argued and submitted April 10, 1896.

Opinion handed down June 22, 1896.

The opinion of the court was delivered by

MCENERY, J. On April 3, 1892, the Fire Proof Cotton Press was destroyed by fire in the city of New Orleans. The fire extended to the Orleans Cotton Press, which, with its contents, was also destroyed. This suit was instituted by the officers of the Orleans Press to recover the value of the cotton burned in their press. They aver

that the fire originated from sparks emitted from an engine owned and controlled by defendants while passing a pile of cotton bales on the banquette alongside of the Fire Proof Press; that the sparks emitted from the engine were due to the negligence of the defendant in the construction and operation of the engine and to the defectiveness of the track at the point at which the sparks were emitted from the engine.

For the origin of the fire and the defectiveness of the track upon which the engine jolted, thus, according to plaintiffs' theory, causing the sudden energy which made the engine emit the sparks, the plaintiffs relying upon the testimony of one Ballard, which it claimed was corroborated by a number of witnesses.

We might, upon authority, dispose of this case, by saying that the testimony satisfies us that the defendant company's engine was properly equipped with all necessary appliances in good order for the arrest of sparks caused by the particular fuel which the company used in the fire box of the engine. Elsewhere there are others, and, it may be, safer appliances used, but they have not been adopted by all roads, being used principally by the Pennsylvania Central. At any rate it is shown that different roads use differently constructed engines, with difference in size of meshes in the wire netting, and we presume that each road equips its engines according to the services it is destined to perform. We are of the opinion that for all practical purposes engine No. 109, which it is claimed emitted the sparks, was properly and effectively constructed and equipped for the arrest of sparks from the burning of anthracite coal—the fuel which was used in the service of the engine. We had a view of the "spark arrester" used in this engine, and we are convinced that sparks of insignificant size could only be emitted under the most favorable circumstances.

We understand from expert testimony that anthracite coal makes no smoke, but emits from the smoke-stack a light blue vapor; that the engine using it throws out fewer sparks and of a different shape than when soft coal is burned. The sparks from hard-coal burning engines are, as a general rule, flakes of coal in a greater or less degree of combustion, and contain less heat than the sparks from soft coal. The sparks that pass through the netting are broken and contain little heat. They live but a short distance in the air—say not more than thirty or forty feet.

The witness Ballard says but few sparks were emitted from the smoke-stack of engine No. 109, and they were the size of his little finger. No sparks of this size could have been projected through the netting with which it was equipped, unless the netting was in bad condition. The testimony is uncontradicted that the netting was in perfect condition.

Locomotive No. 109 was built by the Brooks Locomotive Works, which is one of the largest works of the kind in the United States. This locomotive was designed by John Clair, the mechanical engineer of the establishment. That he is able and competent is evident from the fact of his employment by such an establishment. His testimony is important because it rests not alone upon theory, but from observation also. He says it is not possible to construct a locomotive that will not emit some sparks, but they are generally dead before they ascend to any appreciable distance and begin to fall. No. 109 locomotive was designed for "diamond stack" to use No. 12 wire with $2\frac{1}{2} \times 2\frac{1}{2}$ mesh. For the extension locomotive the general practice is to use the $2\frac{1}{2} \times 2\frac{1}{2}$ mesh with No. 12 wire, and for the diamond stack $3\frac{1}{2} \times 3\frac{1}{2}$ and No. 13 wire. Extension fronts have been in use twelve or thirteen years, and were introduced by the Pennsylvania Road, with which he was connected when they developed them. The universal practice of all locomotive builders is to use the $2\frac{1}{2} \times 2\frac{1}{2}$ mesh in extension fronts. He says he has run locomotives equipped with the three and one-half mesh and with two and one-half mesh, and the latter throws out no more sparks than the former. Under the same condition the two throw out about the same size of sparks. Ninety-two per cent. of the locomotives built by the Brooks Locomotive Works were equipped with the two and one-half netting. This size of mesh was in general use and approved by the railroads. Experience must have demonstrated its efficiency. This particular mesh is in general use on many of the largest railroads, and the testimony is that it arrests sparks about as well as any other. Railroads, it may be assumed, adopt appliances which will protect them from liability. Railroads using appliances in common use, which have been used for a long time and found sufficient to protect their own and other property from danger, should, as a general rule, be protected against the charge of negligence because of its use. If such appliances are used the burden of proof is on plaintiff to show that they were defective, or improperly and negligently used.

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In the case of *V. & A. Meyer vs. Railroad Company*, 41 An. 640, we held that when an engine was properly equipped with effective appliances to prevent the escape of sparks the burden of proof is shifted to the plaintiff, and the testimony must be very strong and convincing to establish negligence on the part of the defendant company. In this case the strong and convincing testimony is wanting.

It is unnecessary to pursue this discussion further, as we have concluded that the testimony does not show with reasonable certainty that the fire originated from sparks emitted from the engine No. 109 belonging to and operated by the defendant company on the morning of the fire. A few sparks were emitted, as stated by the witness Ballard, and he says he did not see them go on the cotton, but only in its direction. The fact that the cotton was set on fire by the sparks is inferred from his statement that the fire originated twenty minutes after the engine passed.

The witness Ballard testified as follows: That engine No. 109 was coming down town about half past 8 or 9 o'clock, and was running at the rate of six miles an hour with the tender in front. As the engine was passing a curve it gave a jerk, and "looked like she sorter threw her wheel off, and the engineer gave it one or two revolutions and the engine went on down the river." When the engine jumped the track with one wheel off, the engineer "pulled out his throttle" and the engine only stopped a second and went on. It was this "jostle" or jump which caused the smoke and sparks to be emitted, few in number, but the size of his little finger. He says the wind was blowing toward the cotton. He did not see any of the sparks go on the cotton, because the engine was between him and the cotton. It was ten or fifteen minutes after the engine passed that he saw the fire on top of the cotton next to the Fire Proof Press. This press was located at the corner of Race and South Front street. The cotton was piled on Race street in front of the banquettes and alongside of the Fire Proof Press. It was in two sections with an interval of some feet separating the two piles. The Belt Road over which the engine was run the morning of the fire is located along Front street, and a spur track runs from about the centre of Race street into the gas yard. Where the spur track joins the Belt Road there is a frog, and it is at this point where the engine is said to have jumped the track and emitted the sparks. The

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witness locates himself at the coal office of Coyle at 6 A. M., where he remained until he saw the fire.

Next to Ballard the plaintiff relies upon the testimony of one H. A. McGregor, who states that about 9:30 A. M. he reached the river front, having passed the cotton in which he saw no signs of fire. When at the river front he saw the fire in the second tier, about the second bale from the end on the side of the cotton just below the tarpaulins. The important part of his testimony is as to the time of the fire, corroborating that of the witness Ballard. The time that the cotton ignited after the passing of the engine is important. These witnesses fix the time at about twenty minutes after the passage of engine No. 109. Without referring in detail to the testimony on this point, we think it satisfactorily proved by the train men operating the engine that the engine No. 109 passed early in the morning, say at 7:30 A. M., and it was several hours before the fire was discovered after the engine had passed. With the wind blowing at the rate and in the direction which the witness Ballard gives it, it is incredible to suppose that after the sparks, the size of his little finger, had fallen on the cotton it would have taken this length of time to ignite. Much stress, too, is laid upon the testimony of several witnesses that the track was rough and in bad condition at the part where the witness Ballard says that the engine went off the track with one wheel, and by giving additional impetus to it, by applying more steam, the engine gained the track and proceeded on its way.

But these witnesses go no further than to say the track, at that point, where there are several rails, is in bad condition, giving the engine a lurch forward toward the frog. The testimony of the engineer and others in charge of the train deny that any such thing occurred as described by Ballard. Our experience alone tells us that it is impossible for an engine to have one wheel off the track, and by giving additional speed to it, to place the wheel again on the rails. The fact testified to by Ballard was, no doubt, that which was observed by the witness Williams, who saw an engine pass over the same track. He says that there was a decided apparent unsteadiness in the wheels and a lurch of the locomotive to the side of the frog. This unusual jolt or lurch was not such as would have attracted his attention unless he had been looking at the wheels of the locomotive, when he certainly would have noticed it. We do not think

Gumbel & Co. vs. Railroad Co.

there was in the passage of the engine over this track such a condition as to require the extraordinary exertion described by Ballard to get the engine on the track and to cause the unusual emitting of sparks the size of his little finger. That Ballard was mistaken we think there is little doubt. His statement as to the time of the passage of the engine is disproved, as well as the make-up of the train. Where his testimony is corroborated by one witness it is disproved by many others. The cotton was only partially covered by tarpaulins, and along the pile of cotton it was possible for it to be ignited at several points. On the contention as to what particular part in the pile the fire occurred there is a conflict of testimony. It is on top near the end of the pile to Front street; again, it is at the bottom, and again in the pile separated from the pile nearest Front street near the opening between the two piles—in an entirely different locality described by Ballard. Nobody seemed to know the origin of the fire. Nine months elapsed before it was discovered that engine No. 109 set fire to the cotton.

An officer whose duty it was to report the fact officially stated, as a theory, it was ignited by a cigarette. The cotton was unprotected by efficient police, and it was not practical to notice who passed by it. It was in a public place, on a public street, and persons could go by it unobserved between the fire press and the cotton. It was as probable that the fire originated by the careless handling of the pipe, cigar or cigarette, as by sparks from the locomotive.

One of plaintiff's witnesses says he left his house at half past nine o'clock, and lit a cigarette, and passed by the pile of cotton on his way to the river. He had passed the cotton about a half a square when he heard the alarm of fire. He does not state that he was smoking when he passed the cotton, but as the habit of cigarette smoking is universal, inveterate and continuous, it may be that others also passed and may have indulged in the habit.

The mass of testimony is conflicting in some particulars, but we think the preponderance is that the engine No. 109 passed the pile of cotton several hours before the fire was discovered; that anthracite coal was used, from which no black smoke could have issued, in which the sparks could be seen, and that the engine was so equipped with a spark arrester that it is not probable that sparks of sufficient size could have been emitted that would live more than thirty or forty feet beyond the smoke-stack, and it is not probable that

Chopin vs. Poilet et als.

sparks of the size described by the witness Ballard were emitted from the defendant's engine, and the testimony does not convince us that the fire originated from sparks arrested from the locomotive of defendant's train.

Judgment affirmed.

No. 12,201.

P. A. CHOPIN VS. J. POLLET ET ALS.

It is not essential for a valid assessment of property on the tax rolls that it should follow exactly the deed of the property to the tax debtor. It is a sufficient assessment if it conforms to it and identifies the property.

A purchaser of property is not concerned with the warranty from the vendor to plaintiff, who seeks to compel his vendee to accept title. He can not proceed against the warrantor of his vendor without express subrogation.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Wall & Watt for Plaintiff, Appellee.

Dart & Kernan for Defendants, Appellants.

Submitted on briefs June 26, 1896.

Opinion handed down June 29, 1896.

The opinion of the court was delivered by

MCENERY, J. Defendants appeal from a judgment commanding them to take title to certain immovable property described in plaintiff's petition.

The plaintiff and defendants entered into an agreement by which the former was to sell the property to the latter, tendering them a good and perfect title. The defendants refused to accept title when tendered, on the ground that there was no personal warranty to plaintiff by his vendor; that the title tendered by plaintiff is a tax title, the property having been sold for the taxes of 1876, 1877 and 1878, made in pursuance of Act 32 of 1884; that the assessments of said property were defective in its description; that neither plaintiff

nor his assigns have been in possession a sufficient length of time to acquire title by prescription, and that defendants fear that the absence of a stipulation of warranty in the title to plaintiff will cause them to be sued and evicted for defects of which they are not aware; that there were no taxes due on said property; that the owner was dead, and his wife also, at the time of the assessments. There is no evidence that the party to whom the property was assessed was dead at the time of the assessments, or that the taxes had been paid on said property.

The description of the property on the assessment rolls was sufficient to identify the property, and to point it out as the property of the party to whom it was assessed.

The deed to Smith, the tax debtor, described the property "as lots five, six, seven, eight, adjoining each other, and measure each thirty feet front on Washington street by a depth, between parallel lines, of one hundred and thirty feet six inches and four lines; said lot eight forming the corner of Washington and Broad streets; lots nine and ten adjoin each other, and measure each thirty feet on Broadway by a depth, between parallel lines, of one hundred and twenty feet."

The assessment and the Tax Collector's deed described the property as "five certain lots of ground in the Sixth District of the city of New Orleans, in the square bounded by Washington, Broadway, St. Charles and Pine streets, designated as lots Nos. 5 to 9; measuring one hundred and twenty feet on Washington street by a depth of one hundred and sixty feet and four inches, forming the corner of Washington and Broadway streets."

The measurement and lot numbers correspond to the title of the person, A. W. Smith, to whom the property was assessed. The property on the assessment rolls and the tax deed is described as a whole and in more accurate detail. This is only the substantial difference in the description.

It is argued that the tax debtor was living in 1880, and may appear and contest the defendants' title. Apparently there are no defects in the tax title. It is *prima facie* a good title, and we are not called upon to invalidate the title, because there is a possibility that Smith may appear and urge grounds of nullity that can only be conjectured, not even raising a cloud on the title as now presented.

The defendants are not concerned with the absence of warranty between plaintiff's vendor and himself. Had there been an express

Brown vs. Land Co.

warranty defendants could not avail themselves of it without subrogation.

Judgment affirmed.

No. 12,142.

MRS. C. BROWN, WIFE OF H. DRESSSEL, VS. PONTCHARTRAIN LAND COMPANY.

When the tax collector sells property for taxes which have been paid, the sale is null and void, and the purchaser at said sale acquires no title to the property and can transfer no title to a third party.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Louque & Pomés for Plaintiff, Appellee.

Benjamin Rice Forman and *B. R. Forman, Jr.*, for Defendant, Appellant.

Argued and submitted May 8, 1896.

Opinion handed down May 18, 1896.

Rehearing refused June 25, 1896.

The opinion of the court was delivered by

MCENERY, J. The plaintiff alleges that she is the owner of certain immovable property described in her petition; that the same was sold by the tax collector, under Act 82 of 1884, for the unpaid taxes of 1876; that one J. H. Griffiths purchased the same in 1894, by virtue of said tax sale, and that he sold the property to the defendant company, which instituted proceedings for the purpose of obtaining possession of said property. She prays for an injunction restraining the defendant company from disturbing her lawful possession, and the annulment of the tax sale, and an order to erase the same from the records.

There was judgment for the plaintiff as prayed for.

The tax sale was based on the assumed fact that the taxes of 1876, due the State, had never been paid, and that the property had been returned, as delinquent, to the mortgage office.

48 1188
49 1781
48 1188
111 1047
48 1188
c115 357
115 399

State vs. Harris.

The property was returned as delinquent to the mortgage office, but the fact is that the property was not delinquent, and the taxes for 1876 had been paid. A certificate from the tax collector shows that the property was not delinquent, and the tax rolls show that the property was assessed in 1876 to the Canal Bank and the taxes paid.

There was no basis for the tax sale, and it is therefore null and void.

The Canal Bank sold the property, in 1876, to Duncan F. Kenner. It is immaterial whether he or the bank paid the taxes. They were paid, and this was sufficient to stop all proceedings against the property, thereafter instituted, to enforce the payment of taxes.

The return of the property to the mortgage office as delinquent, was an error and an inexcusable one, and the tax rolls show that the taxes had been paid.

No title was vested in Griffiths by the tax sale, and he could transfer none to the defendant company.

Judgment affirmed.

No. 12,199.

STATE OF LOUISIANA VS. ISAAC HARRIS.

Proof of flight is admissible. The weight of this evidence is frequently modified by the circumstances. It should upon that ground be excluded. The fact is to be considered and weighed with the other evidence.

The Supreme Court having no jurisdiction in criminal cases to review questions of fact the evidence will not be examined for the purpose of determining whether it authorized a conviction.

A PPEAL from the Twenty-sixth Judicial District Court for the Parish of St. Charles. *Rost, J.*

M. J. Cunningham, Attorney General, and *P. E. Edrington*, District Attorney, for Plaintiff, Appellee.

J. L. Gaudet for Defendant, Appellant.

Submitted on briefs June 15, 1896.

Opinion handed down June 22, 1896.

48	1189
104	410
48	1189
112	335
48	1189
116	720
6115	721

State vs. Harris.

The opinion of the court was delivered by

BREAUX, J. Isaac Harris was indicted for murder in 1891.

He was tried in 1896 and convicted of manslaughter. From a sentence to hard labor in the penitentiary for a term of ten years he prosecutes this appeal. (He is not in this court represented by counsel.)

The questions for review are presented in two bills of exceptions.

The first was taken to the ruling of the trial judge permitting the District Attorney to propound the question whether he had searched for the accused.

The lapse of time between the date of the alleged crime and the trial suggests of itself the propriety of inquiring and even searching for the accused.

The objection was made, it is stated by the judge in the bill of exceptions, after the sheriff had sworn that he could not find the accused at his domicile at the time the crime was committed. This statement of the sheriff having been made without objection, as shown by the bill of exception, it was proper to introduce proof of the sheriff's action in the endeavor to obtain the presence of the accused.

Proof of flight, though not conclusive of guilt, is admissible as ground from which to infer consciousness of guilt.

The weight of the evidence may be greatly reduced under certain circumstances; it is none the less admissible. The admissibility of the proof of flight, as one of the presumptions of guilt, is not limited to secret crimes, as was contended in behalf of the accused on the trial. The proof is as admissible where the deceased was killed publicly, in the presence of witnesses, and the plea is self-defence, as where the crime was secretly committed.

The second bill of exceptions was taken to the refusal of the new trial. The accused in the motion for a new trial detailed a number of facts that he urged, should have convinced the jury of his innocence.

The bill of exception was based on the motion for a new trial, which was annexed to the bill.

The grounds were substantially that the verdict was contrary to the law and the evidence.

To review the decision of the court below, a case must be presented by a bill of exceptions disclosing all that is essential to that end.

Glacona & Son vs. Bradstreet Co.

Here the evidence is not embodied in or made part of the bill of exceptions, and is therefore not before us.

The allegations contained in the motion for a new trial were not evidence in the case, and that is all that was brought up for our examination.

If they were evidence and properly before us for review, they present only questions of fact, not reviewable on appeal.

These bills of exceptions set forth the only grounds. The verdict and judgment must be affirmed.

They are affirmed.

No. 12,104.

GIACONA & SON VS. THE BRADSTREET COMPANY.

Mercantile Agency.—The business of commercial agencies is lawful and beneficial to commerce.

Their publications issued to subscribers generally are not privileged communications.

Not Privileged.—If their reports, issued on printed lists and generally distributed among their subscribers, are erroneous and thereby occasion damages, they may be held liable.

Negligence not Retrospective.—As relates to an erroneous report, negligence of one injured, by which the injury is aggravated, will not bar him from recovering damages for so much of the injury suffered prior to the negligence.

Damages Special not General.—The supposed libel was not actionable *per se*, but only in respect to the special damage claimed and shown.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Harold W. Newman for Plaintiffs, Appellees.

Harry H. Hall for Defendant, Appellant.

Argued and submitted April 24, 1896.

Opinion handed down May 4, 1896.

Rehearing refused June 25, 1896.

The opinion of the court was delivered by

BREAUX, J. The defendants were engaged in the business of col-

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lecting and distributing information as to the credit and financial standing of men in business.

The plaintiffs conducted a retail grocery and commission business.

The suit is for an alleged libel committed, it is averred, by the defendants against plaintiffs. The important facts in deciding the issues are that it was published by a reporter of cases in the courts (in the daily court reports) that suit had been brought by H. Lochte & Co. vs. S. Glacona for one hundred and ninety-seven dollars and eighty-nine cents on an account.

Subsequently the same court report published that a judgment had been obtained by this plaintiff against S. Glacona.

Defendants, in their printed list of changes furnished to subscribers, published that plaintiffs (not S. Glacona as mentioned in the court report, but erroneously), S. Glacona & Son, had been sued.

In the copies of the city directory, introduced in evidence, there was only the firm of Glacona & Son, and no other firm of a similar name.

The defendants in error assumed that plaintiffs had been sued upon an open account, and so reported to their subscribers.

The credit of plaintiffs being that of men of limited means, it is contended by them was affected by the report; several merchants testified that they refused to credit the firm and gave for reason that a pending suit against one in business unexplained is nearly always attended with unfavorable effect to his credit.

Glacona & Son brought this suit for damages against the defendant a few weeks after the defendants had furnished the erroneous information to their subscribers.

The jury found a verdict for plaintiff in the sum of four hundred and ninety-nine dollars. From the verdict and judgment of the court the defendants prosecute this appeal.

In argument it was argued that there is no evidence that there existed any such firm as Glacona & Son, and that without such evidence plaintiffs could not maintain their action.

No plea was interposed and no objection made upon this point in the lower court save in the motion for new trial.

It is true that the existence of the partnership was not specially shown. But in the evidence the firm is frequently referred to as an existing partnership; its existence was not at any time questioned. Moreover, objection to the capacity of plaintiffs to stand in judg-

Glacona & Son vs. Bradstreet Co.

ment not raised in the pleadings will not be noticed. *Adams & Co. vs. Coons et al.*, 37 An. 305.

There is nothing of record suggesting ill feeling on the part of the defendants, and, therefore, malice is entirely eliminated from consideration.

This brings us to the question of the error committed and its effect upon plaintiffs' business.

It was the misfortune of plaintiffs that those with whom they had business relations were not careful in writing down their names.

In seven bills introduced in evidence their names are differently given. They were made out against S. Glacona & Son, G. Giacano, and other similar names. In the petition, which gave rise to the impression that plaintiffs had been sued, the name of the defendant in the case was given as Glacona. The answer was written in the name of Giocchino. This answer was endorsed, however, by defendants' attorney: *Henry Lochte & Co. vs. S. Glacona*.

Defendants' clerks testify that they were informed at Lochte's place of business, that the Glacona sued were Glacona & Son.

Despite all this, the defendants were not entirely free from all negligence.

By referring to the petition in the case, in question, the defendants' agents would have obtained correct information as to who had been sued.

They are not justifiable, in view of this fact, in having made a report such as they made to their subscribers.

The similarity of names was sufficient to mislead an ordinary person, but defendants' agents, presumably, are experts in the business and fully understand the importance of making correct reports, and of training themselves in securing information without injuring any one needlessly. Their office is to assist commerce, and facilitate as well as promote business without injuring any one's credit.

With reference to these companies, the rule is that publishing of a tradesman that he has been sued, if true, is not actionable; but if untrue, and is owing to negligence, it may give rise to an action.

There must, however, be actual injury shown.

In a case (in the State of Maryland) in which the present defendants were defendants, the court held that the alleged libel, similar to the libel, here contained nothing actionable *per se*; and that all proof of general damage to the business and credit of the plaintiff by the publication was properly excluded.

 Ashton vs. His Wife.

Here the record does not sustain any claim for general damages; there is no pr. of upon which to base a judgment for such damages. The amount of plaintiffs' business is not shown with any certainty, and no attempt was made to prove the extent of damage to his business as a whole. If any damages are due they are special damages. Only compensatory damages can be allowed at all.

Another objection is interposed which is sustained by the fact that the plaintiffs never went to the defendants to complain. They did not seek to minimize any damages they allege that they have suffered. In a case such as here, one in regard to whom an untrue report is published should take seasonable steps to correct the error. It would have been reasonable to call on defendants for explanation and correction of the erroneous report. None the less, negligence on plaintiffs' part after the injury by which it is aggravated will not bar them from recovering damages for so much of the injury suffered prior to the negligence. And here we will state that under the proof made the damages must be limited in amount.

Immediately after the publication several merchants refused to credit the plaintiffs, but the amount of damages occasioned by this refusal is not clearly shown. It is evident that some damage was caused.

As relates to a few transactions it was attempted to trace the difficulties encountered to the publication of defendants' lists. We have considered the whole testimony upon the subject, and fixed the damages in the amount stated in our decree.

It is therefore ordered, adjudged and decreed that the judgment and verdict appealed from be amended by reducing the amount of the judgment from four hundred and ninety-nine dollars to one hundred and fifty dollars and interest on the last stated amount in amount and date as fixed in the judgment of the District Court.

As amended the judgment appealed from is affirmed at appellee's costs.

 No. 12,139.

JAMES ASHTON VS. SOPHIE GRUCKER, HIS WIFE.

The utterances of a wife to a confidential friend while seeking sympathy and advice and when smarting under what she reasonably considered to be wrongs received at the hands of her husband by neglect of herself and indiscreet, injudicious and excessive, if not criminal, attentions to some other woman will not be held to be "public defamation."

48	1194
107	717
48	1194
111	408
48	1194
112	772

Ashton vs. His Wife.

The husband alleging "public defamation" demands separation from bed and board; the wife reconvenes and claims a separation on the grounds of abandonment. *Held*: When the husband fails, the demand of the wife in reconvention will also be dismissed; it would be against the policy of the law that the husband should find himself confronted by a judgment of separation from bed and board in favor of his wife on account of abandonment, based upon neglect or refusal to return upon summons made, when the propriety of his own course and the conduct of his wife was at the time being made the subject of judicial investigation.

The letters of the husband to the wife are admissible in evidence in a suit between the parties for a separation from bed and board. The husband is not, through such letters, made to be either a witness for himself or against his wife. The letters are used in evidence as containing matters emanating from the husband to break down his cause of action.

Any act of the plaintiff husband or admission made by him which would estop him, throw his demand out of court or show his demand not well founded, the defendant wife is entitled to prove, and she is not cut off from doing so by the circumstance that the fact is shown through a letter written by the plaintiff husband.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

Gus A. Breaux and Charles P. Fenner for Plaintiff, Appellee.

P. F. Hennessey (Benjamin Rice Forman, of Counsel) for Defendant, Appellant.

Argued and submitted May 22, 1896.

Opinion handed down June 15, 1896.

Rehearing refused June 29, 1896.

The present action is an action for separation from bed and board, instituted in August, 1894, by a husband against his wife, upon an allegation that his living with her is altogether insupportable and impossible. This condition of things is averred to have been brought about by her jealous disposition, which caused her to make his home unbearable, by her repeated, unfounded, irritating and vexatious reproaches against him, and by her constant quarrels and abuse. He averred that six or seven years prior to the institution of the present suit, matters reached such a point as to force him to leave the conjugal domicile, to which, however, he returned on a promise by his wife that she would cease quarreling

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and worrying him; that this promise not being kept, he was again forced, for the same causes as the first, in the month of January, 1892, to leave the matrimonial domicile, wishing to avoid public scandal, but that none the less he had provided continuously for his wife; that he had lived apart from her since January, 1892, having no relations with her except to provide subsistence for her from month to month; that since the second separation she had declared publicly to different persons that he was keeping a mistress and living in open adultery, which was absolutely false and untrue, without any foundation in fact; that these statements were made in malice, with the knowledge that if they were believed by his employers it would result in his immediate discharge from employment, and he was injured by such defamation of character. In a supplemental petition he fixed the dates of these charges as having been made by her at various times in 1893 and 1894, and as having been made to one Gillen and Mrs. Julia Smith and her son, Edward Smith. The defendant met plaintiff's demand by counter allegations against him, admitting that she and her husband had had numerous quarrels, but charging that they were mostly brought about by his constant, assiduous and improper attentions to and relations with another woman, which were the subject of neighborhood gossip and comment, and had caused her great distress and unhappiness; she charged him also with unreasonable prejudice and dislike to her children by a former marriage. Assuming the position of plaintiff in reconvention she charged that her husband had, for years prior to the bringing of his suit, withdrawn without just or legal cause from the matrimonial domicile. She prayed that he be summoned, according to law, to return, and in the event of his failure so to do, she have judgment in her own favor rejecting his demand, but granting her a separation from bed and board from her husband. Defendant attempted, on the trial, to file an amended answer, in which she alleged that since the dates of the defamation alleged in his petition (the truth of which allegations she denied), plaintiff had repeatedly invited her to his rooms by letters, written from May 1, 1893, to October, 1894, and she complied with the same and resumed their marital relations during said period; wherefore, she prayed that plaintiff's demand be rejected and that she do have judgment against her husband for alimony for an amount not less than forty dollars per month.

Ashton vs. His Wife.

The court refused to allow the amended answer to be filed on the ground that it was presented too late, and because its averments were in conflict with the allegations of defendant's answer, wherein she had averred that her husband had, in January, 1892, withdrawn from the matrimonial domicile, and "that ever since that day he had remained away and had severed his relations with defendant as man and wife."

During the trial defendant offered to introduce a number of letters from her husband to herself at various dates between May, 1893, and July, 1894, "to show that he received his wife at that time and took her into his room—to show reconciliation"—but on plaintiff's objecting that defendant had averred that there was no reconciliation at that time, and that they were statements of the husband, and, therefore, inadmissible under Art. 2281 of the Civil Code, as amended, they were excluded. We find them, however, in the record, annexed to a bill of exception taken by the defendant to the ruling of the court in regard to the same.

One Adele Armant, the owner or lessee of the house at which plaintiff was residing during the period covered by these letters was permitted over plaintiff's objections to testify to the fact that during that period defendant had visited plaintiff at his rooms and was there with him several hours on different occasions. The court permitted this fact to be shown, not to prove a reconciliation, but as tending to show the nature of the quarrels between the parties and how serious they were.

The District Court rendered judgment in favor of the plaintiff, decreeing a judgment of separation of bed and board between himself and his wife and rejecting the wife's reconventional demand. From that judgment defendant appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. We are of the opinion that in so far as plaintiff seeks to have a separation upon the ground that his wife had "publicly defamed" him it must fail for several reasons. In the first place whatever statements were made by the defendant in respect to the relations which she asserted existed between her husband and her supposed rival were not in our opinion either wantonly or maliciously made, nor made with the intention of injuring her husband.

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They were made to Gillen, the brother-in-law of the plaintiff, and to Mrs. Smith and her son, who seemed to have been friends of both parties, and in the course of conversation such as parties holding close relations with each other are apt to have in discussing mutually their family affairs. There is nothing tending to show that it was either expected or desired that these conversations should be repeated to outside parties. Those which took place with the Smiths seem to have been made prior to the date fixed in plaintiff's pleadings and in the interval between his leaving his home the first time and his return, and to have been made in connection with a request made of Mrs. Smith by the defendant to interpose her good offices toward inducing her husband to return. In *Homes vs. Carrier*, 16 An. 94, we said that the charge of adultery preferred by the wife against her husband to serve as the basis for a judgment of divorce does not of itself amount to a defamation upon the failure of the former to sustain the allegation by proof. If the accusation be not wanton or malicious, although unfounded in point of fact, it can not with propriety be said that there was a public defamation.

In *Bienvenu vs. Buisson*, 14 An. 386, in which a wife claimed a separation from her husband, we said that it was impossible to give a defamatory intention and effect to epithets applied by a husband to his wife when no one was present but the spouses themselves, although such epithets would have had much gravity had they been uttered in the presence of a third person. Plaintiff has called our attention to the latter part of this sentence and deduces from it broader consequences than the expression justifies. Unquestionably a charge of adultery made by a husband against his wife in presence of a third person would present a question of a much graver character than the same charge would have had had it been shown to have been made by the husband to the wife in their bedchamber; but it by no means follows that such difference would consist in leading up to a right to a separation even by a wife independently of the time, place and circumstances under which the charge was made and independently of the relations toward the parties of the person who might be present on such an occasion and the circumstances under which he was present.

In *Cass vs. Cass*, 34 An. 614, in which a wife assigned as a ground of complaint against her husband that he had defamed her, the court said that the argument advanced by the husband, that to constitute

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defamation within the meaning of the Code the offensive epithets or words must have been uttered in public, did not meet with its sanction. That the charge of adultery against a wife by her husband made in the presence of her servants and of a visitor, or to another person at the latter's house, as was shown in that record, did constitute a public defamation as contemplated by our law, for which the injured wife was entitled to the protection of the courts. The court was of the opinion that the charge as made in that particular case was under such conditions as to justify the interpositions of the court's action in favor of the wife. We think there was no necessity to have alluded at all to the subject, as from the standpoint of a "public defamation," for the conduct of the husband, even if it were not a "public defamation," was evidently of a character such as to cause it to fall under the terms "outrage of one toward the other" under the other provisions of the law of separation, and to warrant the judgment in favor of the wife.

We are not inclined to designate as a "public defamation" the utterances of a wife to a confidential friend while seeking sympathy or advice and when smarting under what she reasonably considered to be wrongs received at the hands of her husband, by neglect of herself, and indiscreet, injudicious and excessive, even if not criminal, attentions to some other woman.

In many such cases the supposed wrongs may have been exaggerated, in others purely imaginary, but we scarcely think that the wife in so acting could be charged in any of them with having "publicly defamed" her husband. In the case at bar we think much of the unhappiness between the parties could have been and should have been avoided by the husband by a cessation of the visits and attentions of which his wife complained—if not entirely, at least to within limits which would have restored harmony in the family. There is such a thing as avoidable unhappiness, and we think that where husband or wife appear before the court without having attempted to remove exasperating or irritating causes of dissension which were directly within their power of control, they can scarcely expect that we should relieve them from a situation from which they could easily extricate themselves. An examination of the testimony in this case leads to the opinion that much of plaintiff's unhappiness consists in doing what any married man might reasonably expect his wife would do under similar circumstances, and in not only

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failing to desist when he saw the consequences of his actions, but in becoming irritable, as he himself admits, by the repeated reproaches of his wife. We do not mean to intimate that there was anything wrong in the conduct of the plaintiff, but it was undoubtedly calculated, and naturally calculated, to arouse the jealousy of his wife, and to make her miserable and unhappy, and when the plaintiff saw this he should have governed himself accordingly. We think that plaintiff's complaint of "defamation" of himself by his wife as a special ground of action finds little support under the testimony in the case. We are of the opinion that the letters of the plaintiff to defendant, which the latter offered in evidence, taken in connection with the testimony of Adele Armant, establish conclusively the fact that the conversations of the defendant with Gillen and with the Smiths are sought to be made to assume an importance in the case which in no manner belongs to them.

The acts of the plaintiff in writing to his wife and receiving her at his rooms, when living at Adele Armant's house, are irreconcilable with the conduct of a man under a sense of wrong at having been publicly defamed. The expressions of the letters, their whole tenor, is opposed to his attaching any weight or importance to those conversations. The real grounds of complaint are plaintiff's unhappiness produced by continuing quarrels between the spouses, resulting from the jealousy of the wife, and to differences between them in regard to the latter's children by a first marriage. This latter ground is not assigned in plaintiff's petition, but is made very prominent in the letters we have referred to. Plaintiff succeeded in having these letters excluded. The conclusions we have reached in the case independently of them make allusions to them unnecessary; but we think they were admissible in connection with Adele Armant's testimony, to show that plaintiff invited his wife to his rooms long after his alleged defamation by her, and that she visited him there at his solicitation, and through that fact to show (what the testimony of Adele Armant was allowed to be introduced to show) that the grievances of these parties were not of the grave and serious character which they would be taken to be if tested simply by the allegations of the parties. The plaintiff was not through these letters made to be either a witness for himself or against his wife; the letters were not to be used for his wife as containing statements therein in support of a demand made by her against him, but as matters emanating from

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himself to be used against himself to break down his own cause of action. Any act of the plaintiff or admission by him which would estop him, throw his demand out of court or show his demand not well founded, the defendant is entitled to prove, and she is not cut off from doing so by the circumstance that the fact is shown in or through a letter written by the plaintiff. Though the letters we speak of may not show an absolute reconciliation between the parties leading to a complete wiping out of all differences and to a resumption of marital relations at a common domicile, we think they do show that the advancing of "public defamation" as a substantive ground of action was an afterthought, or that it was not at the time of writing those letters considered a matter of grievance—in other words, if it ever had existed as a ground of complaint, that particular stale grievance had passed out or been stricken from the list of grievances—practically it had been forgotten if not forgiven.

In dealing with this matter of the public defamation of the plaintiff by the defendant we have in reality disposed of the whole case, for we have already expressed the opinion that plaintiff's conduct was of a character such as naturally to arouse the jealousy of his wife, and that he was (to an extent sufficient to cause him to fail in this action) to blame for the resulting quarrels and his own resulting unhappiness. Plaintiff contends that the wife is not authorized in this suit to claim in reconvention a separation from bed and board based upon abandonment.

The *syllabus* in *Bienvenu vs. Buisson*, 14 An. 386, is to the effect that "a reconventional demand on the part of defendant for a separation on the ground of abandonment is not admissible. A particular form of procedure is required by the Code for obtaining a decree of separation on that ground, and to that form the defendant must have recourse for relief." The same matter is referred to in *Jolly vs. Weber*, 36 An. 678, in which the husband reconvened, praying for a separation of board on the ground of abandonment by the wife and caused, during the pendency of the suit brought by her for a separation, summons to be served upon her to return to the matrimonial domicile. Referring to defendant's reconventional demand, the court said: "We are at a loss to appreciate the relief which defendant could possibly claim under his wife's refusal to obey the summons, in the face of the showing that her continued absence was justified in law by the order of the court allowing her another and a

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different domicile. The production of the judge's order assigning her a house to live during the pendency of the suit, and which is a matter of record, is unquestionably a sufficient answer and a justifiable showing to the summons of her husband through the court directing her to return to the latter's domicile. The proceeding, therefore, could not give rise to a judgment sentencing her to comply with her husband's request, and all matters connected with the alleged abandonment must be eliminated from the cause."

We find a decision in France to the same effect: "Le grief résultant de ce que le mari refuse de recevoir sa femme au domicile conjugal ne serait pas recevable s'il se fondait uniquement sur ce que le mari n'aurait pas tenu compte d'une sommation à lui faite avant la signification de l'arrêt, qui avait rejeté une demande en séparation de corps antérieurement formée par lui." Trib. Seine, 27 Mai, 1868, D. P. 72-1, 87-8.

In the *Blennu* case defendant was evidently seeking to obtain a separation from bed and board on the ground of abandonment of the wife by direct proof of the abandonment administered on the trial, without having had recourse to the various summons and orders to return prescribed by the Code.

The abandonment of this case is that of the husband, and it is alleged to have antedated the bringing of plaintiff's suit by several years. The various summons to the husband to return were made during the pendency of the present suit, in support of the reconventional demand. Our decision in this case being a rejection of plaintiff's demand, carrying with it a conclusion that he was not warranted in withdrawing from the matrimonial domicile, it may be claimed that we could and should now give effect to the summons made during the suit, or reject the plaintiff's demand and leave the reconventional demand standing for future summons. We have no right to say that plaintiff would not be willing, upon the rendition of this judgment, to become reconciled to his wife and return to her. It would be against the policy of the law that he should find himself confronted by a judgment of separation from bed and board in favor of his wife on account of abandonment, based upon neglect or refusal to return upon summons made when the propriety of his own course and the conduct of his wife was at the very time being made the subject of judicial investigation. We do not think he should be placed, finally, in default pending the litigation, but that the summons

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upon him should be made only after the termination of his own suit, leaving him free to act from that time forward. We think every possible opportunity should be afforded the parties to reconcile their differences on that ground, if no other; we would not be inclined, even if it were allowable, to permit the reconventional demand to stand with a right to make new summons under it after plaintiff's demand had been rejected. The general rule is that the main demand and that in reconvention should be disposed of at one and the same time, and it is peculiarly proper that this rule be adhered to in this case, in which we are impressed with the idea that the parties are not really so far apart as they might appear to be.

For the reasons assigned, it is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that plaintiff's demand be rejected. It is further ordered, adjudged and decreed that the demand in reconvention of the defendant be dismissed as of non-suit.

No. 12,174.48 1203
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CATHERINE M. DAUGHTRY VS. THE KNIGHTS OF PYTHIAS.

Under a contract of life insurance issued by a mutual company, conditioned to be subject to any by-law thereafter to be enacted, the insured is bound by a subsequent by-law, forfeiting such policies when the insured should die by his own hands.

A PPEAL from the First Judicial District Court for the Parish of Caddo. *Land, J.*

Leonard & Randolph for Plaintiff, Appellee.

Wise & Herndon and *J. Zach. Spearing* for Defendants, Appellants.

Argued and submitted June 4, 1896.

Opinion handed down June 15, 1896.

Rehearing refused June 30, 1896.

The opinion of the court was delivered by

MCENERY, J. F. A. Daughtry, the husband of plaintiff, was a member of the order of the Knights of Pythias, and belonged to the endowment rank.

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He was found dead in a cell of the jail at Shreveport, La. The widow instituted this suit for the amount of the insurance on the life of her deceased husband.

The defence is that the deceased took his own life, and that the policy was forfeited by the laws of the order.

The facts recited in the record show that the deceased took his own life. There is no theory that can be advanced under the facts that could lead to a doubt of death by suicide. There is no basis for a theory that the death of the deceased was caused by accident, or that he met his death at the hands of others.

In *Leman vs. Life Insurance Company*, 46 An. 1186, we held that "when circumstantial evidence alone is relied on to establish suicide, it is at least within bounds to say the evidence must exclude with reasonable certainty any other cause of death." The evidence is such that no other conclusion can be arrived at than that the deceased voluntarily took his own life.

The plaintiff contends that if it be found that the husband committed suicide the policy is nevertheless due and payable, because when the certificate of membership of the endowment rank was issued to him it contained no provision against death by suicide nor did the laws of the order exclude self-destruction from the risks under the policy of insurance stipulated in the certificate; that the legislation thereafter forfeiting the policy on account of suicide could not affect a policy or certificate of membership issued prior thereto; that such legislation was *ex post facto*, and finally that the legislation did not bear on the contract, but only as to the fitness and qualification of membership, and related exclusively to the discipline of the order.

Orders like the defendant association have multiplied in recent years. They are organized for the mutual benefit of the members, taking care of the sick and afflicted in life and providing for the family of the deceased member after death. Rules and regulations, a constitution and by-laws are enacted for their government. Every member who joins one of these orders does so with a full knowledge of its laws and usages. He is bound by the constitution and by-laws, and subjects himself to their discipline in order to receive the benefits conferred by the order. There can be no law or regulation enacted after his membership that would destroy the benefit agreed to be conferred upon him by the laws and regulations in force at the

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time he joined the order. His contract of insurance could not be abridged or violated without his consent. But provision is made in the constitution for its amendment, and we see no reason why the members of an association of this kind can not, like the body politic, change its laws, enact new ones and discipline its members by police regulations.

In both cases the members, by their vote, participate in the change by the rule of the majority. In neither case can vested rights be destroyed. The vested right that the deceased had was for his family to receive the sum of three thousand dollars, provided he complied with the laws of the order. There was no vested right in selecting the mode and manner of his death. Had there been no subsequent legislation there would have been no prohibition to the payment. But the order had a right, independent of any stipulation or agreement, to say that no member should take his own life and receive for his family the benefit of the life policy. It was a matter of legislation in which each member, through representation, assented. It was a police regulation in the interest of the discipline and welfare of the endowment rank. We understand from the documents accompanying the transcript that payments of policies on account of suicides had become so frequent that the endowment fund was endangered. Suppose, in the State of Louisiana, persons should insure themselves and commit suicide, in order that the policy should go to the beneficiaries, and it should become so frequent as to endanger society, would any one doubt the wisdom or the validity of a law which should say that no existing policy, or those thereafter issued, should be paid if the policy holder committed suicide? So in this case, the order of the Knights of Pythias applied a remedy, by declaring the forfeiture of existing and future certificates of membership in the endowment rank on account of the self-destruction of the holder of the certificate.

But in this case, the holder of the certificate was bound by the stipulations in it. When issued to the husband of plaintiff it contained this agreement: "and in consideration of the payment hereafter to said endowment rank of all monthly payments as required and the full compliance with all the laws governing this rank now in force, or that may hereafter be enacted, and shall be in good standing under said laws," etc.

In the certificate it is stated that if any of the requirements of the

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laws in force governing the endowment rank shall be violated, the Supreme Lodge of the order shall not be liable for the amount of the policy.

The certificate covers both the laws which may thereafter be enacted, governing the endowment rank, and the good standing of members under the existing regulations.

After this certificate was issued to F. A. Daughtry, a law was enacted by the proper authority, and approved by the Supreme Lodge, forfeiting the policy on account of suicide. Any law enacted in pursuance of this agreement is the voluntary consent of the members of the order, made for their mutual benefit and by their proper representatives.

In the case of Supreme Commandery Knights Golden Rule vs. Ainsworth, 71 Ala. 436, the facts were almost identical with those in the instant case. The syllabus of the case reads: "Under a contract of life insurance issued by a mutual company, conditioned to be subject to any law thereafter to be enacted, the insured is bound by a subsequent by-law forfeiting such policies when the insured should die by his own hands, sane or insane." This case is well supported by sound reasoning and abundant authority, and we accept the doctrine announced.

It is ordered that the judgment appealed from be annulled, avoided and reversed, and it is now ordered that plaintiff's demand be rejected with costs.

No. 12,177.

H. & C. NEWMAN VS. A. B. COOPER, T. J. COOPER ET ALS.,
INTERVENORS.

The court again affirms that community creditors are entitled to be paid from the community property, and that this right can not be impaired by the mortgage on such property executed by the husband after the death of his wife. Civil Code, Arts. 2402, 2406, 2409; Newman vs. Cooper, 46 An. 1485; Germain vs. Gay, 9 La. 584; Ware *et al.* vs. Jones, Sr., 19 An. 430; Palmer Dickson *et al.* vs. H. P. Dickson *et als.*, 37 An. 915, and authorities there cited.

The court indicates the mode of enforcing such mortgage.

If in a contest between the father's creditors and his children, claiming also to be his creditors, he can be required in the adjustment of his account with them to charge for their board, maintenance and education, no such charge can be admitted if the children had revenues derived by the father or under his control applicable to their support. Mercier vs. Canonge, 12 Rob. 885.

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The father, except under exceptional conditions not existing in this case, can not bind his minor children for debts arising for his individual contracts. C. C., Art. 350; Urquhart vs. Scott, 12 An. 674; Payne vs. Scott, 14 An. 773; A. Miltenberger vs. J. P. Elam, Tutor, *et als.*, 11 An 667.

A PPEAL from the Sixth Judicial District Court for the Parish of Richland. *Ellis, J.*

J. W. Willis for Plaintiffs, Appellants.

Gunby & Sholars for Defendant and Intervenors, Appellees.

Argued and submitted June 5, 1896.

Opinion handed down June 22, 1896.

The opinion of the court was delivered by

MILLER, J. This case, a contest between the plaintiff, a creditor of the defendant, and his children the intervenors, claiming the property of the community existing between their father, the defendant, and their deceased mother, the property having been conveyed to the children by the father in payment of paraphernal funds of his wife alleged to have been converted by him, was before us in 1895 (43 An. 485, Newman vs. Cooper). The plaintiff's debt is secured by a mortgage on the community property executed after the death of his wife. The previous appeal was by the children from the judgment for the plaintiff's debt, with mortgage on the undivided half of the property. The judgment refused to enforce the title of the children, and if there was an indebtedness of the community for paraphernal funds of their mother, the judgment excluded one-half the community for liability for that indebtedness. We remanded the case with the view of ascertaining the amount of the community debt entitled to be paid, we thought, from the mass of the community, and this debt ascertained, there would be established the share of the defendant in the community, on which, in our view, his mortgage was to operate. Our previous decree construed in its entirety conveys this purpose, consonant as it is with the reasoning of the opinion. But the decree seems to have been misunderstood.

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The case now comes back on the plaintiff's appeal from the judgment for their debt, but denying the mortgage, and in favor of the intervenors for the property. It is manifest the judgment does not conform to the views expressed in our opinion. We affirmed that if the children were community creditors they were entitled to payment from the mass of the community assets, and that no mortgage by the husband after the death of his wife could defeat that right. The corollary of the proposition was that the plaintiff's mortgage must be restricted to one-half of the property; the community debt first deducted, or, as it is termed in the decisions, the *residuum*; the other half of the *residuum* accruing to the heirs of the deceased spouse. See 45 An. 1485, in which all the authorities are reviewed.

The plaintiffs on this appeal urge on us that the judgment is erroneous in depriving them of their mortgage operative on the share of the surviving spouse, and because the judgment gives to the children the entire property in satisfaction of the alleged debt for the paraphernal funds of their mother claimed to have been received by their father, and it is further earnestly insisted by plaintiffs that this alleged debt is not established.

On the other hand the intervenors, the children, contend that our previous decree required the settlement of the community; it is claimed that the supplemental petition filed by plaintiff after the case was remanded did not make the requisite parties, nor were any notices given to creditors or other steps taken by the intervenors that our decree required; but, instead, the petition proposed a partition, and hence it is claimed the succession or community is still unsettled, and in view of this alleged non-compliance with the decree it is urged the exceptions to the proceedings should have been sustained. On the merits it is urged that the debt to the children for which the father conveyed to them the community property is proved, and therefore the title of the children is maintained as decided by the lower court.

In remanding the case it was not the purpose to restrict the plaintiffs as to the method of proceeding. Their mortgage operative only on the one-half the property, with the primary deduction or charge on the whole property of such community debt as might be proved to exist, it was indispensable to have determined whether there was that indebtedness. This inquiry for the lower court was our purpose in remanding. A proceeding against the proper parties

presenting the issues as to the plaintiffs' debt, mortgage and its enforcement, and as to the indebtedness of the community at the date of the death of the defendant's wife in 1883, followed by the appropriate judgment fixing the community debt, if any, and the consequent charge on the property, or deduction from its proceeds if sold, would be an adjustment of the rights of the parties or settlement of the community, admitting of consummation by the sale and application of the proceeds directed by the judgment. That application of proceeds should be: first, the payment of the community debt; one-half the residue to the heirs of the deceased spouse; the other half to the surviving spouse, and if, as in this case, he had executed a mortgage on his share, the mortgage to be satisfied out of that share. The mortgages on community property, executed after the death of the wife, when there are community debts outstanding, and the mortgagor has only his share of the *residuum* of the community after discharging its debts, are apt to give rise to difficult questions when the community creditors call for their rights. In this case, however, where the issue is solely between the children and the plaintiffs, and the community property consists in that mortgaged to plaintiff it seemed to us, it would not be difficult to adapt the proceeding for the adjustment of the rights of the parties. There is no necessity or basis to demand a partition of the property; plaintiffs are creditors, not owners. But, with that exception, the supplemental petition in this case, substantially, presents the issues and admits of the required judgment determining or rejecting the alleged community debt, and thus fixing by that charge or deduction the share of the *residuum* subject to plaintiff's mortgage, and on which it should be decreed to operate. We perceive that the intervenors complain that the proper parties were not before the court. They are, in our view, the intervenors, but we find in the record an acceptance and answer for all. If in point of fact the minors are not provided with representatives that should be remedied. In our opinion the supplemental petition omitting all relating to a partition and its details, directed against the proper parties followed by the judgment of the character we have indicated, is substantially the requisite proceeding.

We are asked by plaintiff to close this litigation on the testimony in the record. The insistence of the intervenors on the objection to the mode of proceeding, suggests there may not have been a full exhibi-

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tion of proof, and we think it best to allow another trial. We will, however, dispose, as far as practicable, of the issues discussed here. The claim of the intervenors is for paraphernal funds of their mother used by their father. It is manifest the debt of the community is restricted to the funds received by the defendant prior to the death of his wife in 1883. It is the status of the community at that date that is the subject of inquiry.

It is urged on behalf of the plaintiffs that this community debt, if established, is to be reduced by the expenses of the board and education of the minors, since the date of their mother's death. The theory that the father can become the creditor of his children for their subsistence and education, does not commend itself. We can understand that an insolvent tutor is to be deemed a creditor in such cases, to the extent of the revenues of the minor, that is to say, in a contest with his creditors he must charge his children with such expenses, to the extent of the revenues, as was held by this court in an earlier decision in which the subject was fully examined. *Mercier vs. Canonge*, 12 Robinson, 385. No such case is presented here. We find in the record, too, that the minors owned a plantation that was productive. With these revenues in his hands applicable to the maintenance of four minors, all young when their mother died, living in their father's house, not of an age then to send to school, and causing but limited increase in expenses, as we read the testimony, we can find no basis for the charge of board and education claimed by plaintiffs in reduction of the community debt. We would reserve this question if, in our opinion, it would serve any purpose; but think it best to remove it from further litigation and speed the case to a determination on the substantial issues.

The plaintiff's debt is for supplies furnished defendant since 1885 for the plantation. It is insisted by the intervenors the minors owe a portion of that debt because the supplies used for the plantation on which they lived, contributed to their support. It has been held that the administrator of a succession advancing to a tutor for the necessities of a minor may charge such advances in his account as administrator. That may be, and it leaves the question as to the liability of the minor to be settled on the tutor's account. When the tutor cultivates the minor's plantation and obtains necessary supplies, it has been held the minors owe or may be held, so far as the supplies of a strictly necessary character

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are shown to have enured to the minors' benefit, and so, too, if the minors' property is destroyed by fire and must be replaced, the minor has been made liable for the expenditure. To decisions of this character we have been referred. McIntosh, Tutor, vs. R. H. Kelly *et al.*, 81 An. 649; C. V. Lagay, Administrator, vs. Mr. and Mrs. J. S. Marston, 82 An. 170; Succession of Sparrow, 39 An. 706; 40 An. 484; Succession of Sparrow, 44 An. 481. Here the supplies were furnished to the defendant for the community plantation, of which he had the revenues. If, under the circumstances already discussed, his charge for board could not be made, it is not easy to appreciate how the children could be made liable either to their father or to plaintiffs for their supplies. The father was not tutor. If he had been the restriction of the law left him without right to bind the children except in the mode the Code prescribes. Civil Code, Art. 350. Urquhart vs. Scott, 12 An. 674; Payne vs. Scott, 14 An. 773. The plaintiff dealt with the father on his responsibility. The supposed benefit that four children derived from the plantation supplies, if capable of appreciation, we think too slender to be the basis of any judgment. We therefore think this question of liability should be excluded from further consideration.

Our conclusion is to remand the case with the direction to the lower court to ascertain, in conformity with this opinion, the debt of the community to the children at its dissolution in 1883, and this includes the recognition of the credits, if any, to which the community may be entitled other than those we hold not to be credits, *i. e.*, for board, education and maintenance and for plaintiffs' supplies; the debt thus established as a charge on the entire property, the judgment to direct the sale of the property, and from its proceeds the intervenors to be paid first, the amount of their community debt and one-half the residue, the other half of said residue, or as much thereof as may be requisite, to be applied on plaintiffs' mortgage debt, to be recognized as operative to that extent only; for any part of plaintiffs' debt left unsatisfied by this application of proceeds, the plaintiffs to be recognized as ordinary creditors of defendant.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and annulled, and this case be remanded for further proceedings, as herein directed, and that appellees pay costs of appeal.

State vs. Lima.

No. 12,192.

STATE OF LOUISIANA VS. ANTHONY LIMA.

On a trial for murder the court had given a general charge in writing, to which no exception was taken.

Counsel for accused asked from the judge a special charge, which was refused, the judge stating there was no evidence to show that the deceased drew his revolver to frighten the accused, and if there had been, accused was fully protected by the general charge, since, if he had apparent reason to believe his life was in danger, the law of self-defence would be applicable *according to the general charge*. *Held*—The Supreme Court will only examine the general charge in connection with the special charges asked, to see how far the complaint made of their rejection may have been ill or well founded in view of its terms. The general charge in a case is directed to the evidence given in the case, and to what would appear to have been conceded as to unquestioned facts which had been elicited on the trial; viewed from a different standpoint, it would be open to serious objection.

An instruction which, enumerating a certain evidential state of facts, closes by instructing the jury that if they found such a state of facts to have been established beyond a reasonable doubt, the jury must find the accused "guilty," if allowable, is exceedingly dangerous.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Moise, J.

M. J. Cunningham, Attorney General, *John J. Finney*, Assistant District Attorney (*Joshua G. Baker* of Counsel), for Plaintiff, Appellee.

Charles H. Luzenberg, *Chandler C. Luzenberg* and *Philip J. Patorno* for Defendant, Appellant.

Submitted on briefs June 6, 1896.

Opinion handed down June 22, 1896.

Rehearing refused June 30, 1896.

The opinion of the court was delivered by

NICHOLLS, C. J. Defendant, indicted for murder, was found guilty of manslaughter and sentenced to the penitentiary for six years. He has appealed. Our attention is directed to five bills of exception. The first four were taken to the action of the District Court in refusing to give to the jury special charges which counsel of accused tendered for that purpose. The fifth was taken to the refusal of the

court to grant a new trial on the application of the defendant. The court gave its general charge in writing. The conclusions we have reached renders reference to any but the second bill of exceptions unnecessary.

The second special charge requested was as follows: "If you find from all the evidence heard upon this trial that the defendant was attacked by the deceased and his companions, but that their intention was simply to frighten and beat the defendant and not to do him any serious bodily harm, but from the nature of their attack the defendant from all the circumstances surrounding him had reasonable ground to believe that there was a design to destroy his life or to commit a felony on his person, and, so believing, shot and killed one of his assailants, then I charge you that the killing of the assailant by the defendant was excusable homicide, and you must find the defendant not guilty."

Per curiam, refusing charge. "There was no evidence to show that Frank Scontrino drew his revolver to frighten the accused, and if there had been accused was fully protected by the charge, since, if he had apparent reason to believe his life was in danger, etc., the law of self-defence would be applicable according to the charge."

There being no exception to the general charge, we have only examined it in connection with the special charges asked, to see how far the complaint made of their rejection may have been ill or well founded, in view of its terms. The general charge in this case was evidently directed to the evidence given in the special case, and to what would appear to have been conceded, or to unquestioned facts which had been elicited on the trial. It would be open to serious objection, viewed from a different standpoint.

The portions of the general charge, which the court referred to as establishing the fact that the accused was protected as to the point asked, are we presume the following:

"If, from the facts of the case, you find that during this altercation between the parties, the prisoner at the bar was suddenly assaulted in a violent manner by several antagonists; that one drew a pistol, and by his acts and the acts of his other assailants, he believed and had good reason to believe, from the character of the attack, that his life was in danger or his person in great danger of bodily harm, and while under this real and honest belief he fired the fatal shot in defence of his life, or to protect his person from great

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bodily harm, then the homicide would be excusable as in self-defence, and you should so find by your verdict."

In another portion of the charge the court had told the jury:

"If you find from the facts of the case beyond any reasonable doubt that, during an altercation between the parties, the prisoner at the bar was subjected to a very serious injury, such an injury as would provoke a reasonable man to an ungovernable passion, and while under the influence of this irresistible impulse he killed and slayed the deceased, he would be guilty of manslaughter, and you should so find by your verdict."

An examination of the general charge as a whole leads us to the conviction that the second special charge asked should have been given, and that the defendant is entitled to a new trial.

We take occasion to say that, in our opinion, an instruction which, enumerating a certain evidential state of facts, closes by instructing the jury that if they found such a state of facts to have been established beyond a reasonable doubt, the jury must find the accused "Guilty," if allowable, is exceedingly dangerous.

It is hereby ordered, adjudged and decreed that the verdict of the jury, and the judgment of the court thereon, be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that this cause be remanded to the Criminal District Court from which it came, for further proceedings according to law.

No. 12,146.

G. W. SENTELL & Co. vs. A. M. RIVES ET ALS.

The managing partner of a commercial partnership has no authority, without the consent of the other members of the partnership, to assume the debt of a third party, and bind the partnership to its payment.

A PPEAL from the Ninth Judicial District Court for the Parish of De Soto. *Land, J.*, First Judicial District, in place of Hall, J., recused.

Leonard & Randolph and *E. M. Hudson* for Plaintiffs, Appellants.

Wm. Goss for Defendants, Appellees.

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Lee & Liverman for Intervenor, Appellees.

Argued and submitted May 19, 1896.

Opinion handed down June 1, 1896.

Rehearing refused June 25, 1896.

The opinion of the court was delivered by

MCENERY, J. The plaintiffs sue the defendants, as commercial partners, doing business in the name of the Traders' Bank of Mansfield, for balance of a stated account. The plaintiffs did a large business with the bank, which was never legally organized, and as consequence of its failure to organize, the defendants are sought to be made liable as partners.

For the history of the organization of the bank and the reasons given for the liability of the subscribers to its stock as commercial partners, we refer to the case of *Williams vs. Hewitt*, 47 An. 1077.

The defence is that plaintiffs did business with the bank as an incorporated institution, and are estopped from disputing its legal existence and corporate capacity; that there existed a partnership between the bank and the plaintiffs, and, finally, the want of authority in the president of the bank to assume the indebtedness of a third party to plaintiffs, which assumption is the ground of plaintiffs' action.

In the case of *Williams vs. Hewitt*, that part of the defence involving the question of estoppel was elaborately discussed, and we find nothing in this case to distinguish it from that one.

The evidence does not satisfy us that the plaintiffs were in any way interested in the bank further than the interest which springs from the anxiety as to its financial condition and its proper management, because of the extensive dealing plaintiffs had with the bank. The bank was plaintiffs' agent in distributing money to the concerns for the supply of farmers, and the taking by these latter organizations crop liens, and procuring the shipment of cotton upon which advances had been made to plaintiffs.

There was a limited company known as *Hewitt & Co.* This company owed the plaintiffs. The bank assumed an indebtedness of this company to plaintiffs, amounting to fifty-five thousand seven hundred dollars and forty-seven cents, for which amount the bank gave

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a check to the firm of Hewitt & Co., who forwarded the same to plaintiffs, who charged the bank with the amount. This occurred May 29, 1893. There was no opposition made to this transaction, and it seems to have been acquiesced in by the directors.

At this time the bank seems to have been solvent; at least, no action had been taken by the directors to close it. There seems to be no contention as to this *assumpsit*, but the contention is to the assumption of the balance of the account of Hewitt & Co., amounting to eight thousand and thirty-three dollars and thirty-three cents. Before the assumption of this balance of account, in consequence of the insolvency of the bank, the directors had ordered the bank closed. The president, J. E. Hewitt, who was also the manager of Hewitt & Co., disregarded the order and kept the bank open and assumed the debt. Plaintiffs approved of this disobedience of the order of the directors.

It is claimed by plaintiffs that the president, Hewitt, had authority to create debts against the bank. This authority is found in the bank's charter, but its proper interpretation means that he shall "contract debts, sign checks, and all other obligations," only in the due and proper course of the legitimate transactions of the bank. It confers no power on him to assume a debt of a third party not connected with the banking business, and for which the bank received no consideration. Besides this, if the charter is to be taken as the measure of defendants' liability, it must be taken in its entirety.

Another section of the charter says that the stockholders shall not be liable for loss or damage incurred by the corporation beyond the unpaid balance of the stock subscribed by them. The plaintiffs were consulted about the organization of the bank, and this charter was submitted to them and they approved of the same.

But, if we eliminate the charter as the articles of association, and consider defendants' liability as commercial partners simply, we fail to find any authority that permits one partner to assume the debt of a third party and bind the partnership, without the consent of the other members of the association.

No authority was given to the president of the bank by vote of the stock subscribers to assume this debt. It was purely gratuitous on the part of the president. If this last item be eliminated from the account, the defendants owe the plaintiffs nothing. It is urged that

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the bank furnished the statement to the plaintiffs, and the balance sued for shows the amount due. But the bank had no authority to furnish such a statement with the item of eight thousand and thirty-three dollars and thirty-three cents, which the bank or the stock subscribers, who are sued as partners, did not owe.

There were five commissioners appointed to liquidate the affairs of the bank. They intervened and sued for balance due the bank by plaintiffs, after striking off of the account the above item. The intervention was dismissed. Although called an intervention it was a distinct and separate suit against the plaintiffs, and could only serve to complicate the issues between plaintiffs and defendants. The plaintiffs had the right to be sued at their domicile on this demand.

Judgment affirmed.

No. 12,048.

MRS. BLANCHE CHOPPIN ET AL. VS. MRS. ROSA DAUPHIN ET ALS.

The tomb owner is without right to cause the removal of the remains of the dead transferred from the places of sepulture first selected by the surviving relatives and deposited by him in the tomb under his assurance, accepted by such relatives and on the faith of which they permitted the transfer, that the remains should rest forever in the tomb.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Benjamin Rice Forman for Plaintiffs, Appellees.

J. F. Poché and Clegg & Quintero for Defendants, Appellants.

Argued and submitted March 25, 1896.

Opinion handed down April 6, 1896.

Rehearing granted May 4, 1896.

Argued and submitted on rehearing May 23, 1896.

Opinion handed down June 22, 1896.

The opinion of the court was delivered by

MILLER, J. The plaintiffs, the son of the late Dr. Choppin and the widow and children of the late Arthur Choppin, sue to enjoin the

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defendants from disturbing the remains of Dr. Choppin, Arthur Choppin and other members of the Choppin family. The petition alleges that the bodies of the deceased members of the family, at the request of the late Dr. Maximillian A. Dauphin, were placed in the tomb constructed by him with the desire on his part, communicated to and accepted by petitioners, that the tomb should be the last resting place of these remains, and averring that the defendant, the widow and legatee of Maximillian Dauphin, threaten, to remove the remains, in violation, it is charged, of his obligation and of her duty as his legatee; the petition, besides the injunction to restrain such removal, prays for judgment decreeing the tomb to be forever dedicated to serve as the burial place of the remains interred therein of the deceased members of the family. The answer of Mrs. Dauphin asserts title to the tomb as legatee of her husband; that he never dedicated it for the purpose stated in the petition, denies that plaintiff ever acquired any right to the tomb or "its occupancy" for the purposes of sepulture, and avers that such occupancy was permitted by M. A. Dauphin from kindness to the Choppins, he having married one of the family; the answer disavows the threats imputed to respondent of removing the remains; avers the tomb is expensive to keep; that she has built a tomb to which the remains of her husband have been transferred, and, desirous of selling the tomb for which she has no use, the answer alleges she made the offer of such sale to plaintiffs, hence it is alleged the injunction issued wrongfully and the prayer is for its dissolution, reserving respondent's right to damages. From the judgment maintaining the injunction the defendant appeals.

Our attention is directed in the briefs for the defendant to the objection to all the testimony offered by plaintiff to show the statements and acts of Maximillian A. Dauphin, importing the obligation on his part that the tomb should be the permanent sepulchre for the remains of the Choppins. The argument of the counsel for the defendant is, that the plaintiffs, asserting an easement or servitude on the tomb or a title to it, can produce no parol proof to support their pretensions. While the petition claims an easement or servitude on the tomb, we must consider all the allegations on which plaintiffs rely. The substantial issue tendered by the petition is that Mrs. Dauphin, by words and conduct, held out to plaintiffs that the remains of their dead should rest forever in this tomb, on the faith of which

plaintiffs consented to the removal of the remains from other sepulchres Dr. Dauphin after this consent effecting that removal and causing to be carved on the tomb the names of the dead along with his own name. After all this, the plaintiffs contend neither Dr. Dauphin or his legatee can require the removal of the remains. We do not think the question is one of title, hence is not affected by the rule of proof cited by the plaintiffs, but is to be solved by other tests.

We do not appreciate there is any material contention as to the facts. The friendship between Dr. Choppin and Dr. Dauphin; the mode of manifesting that friendship chosen by him, of an imposing tomb and his inscription upon it of the names of his friend and of the deceased members of his family, with that of Dr. Dauphin; the fact that he caused the remains of the deceased, Dr. Choppin having died about three years before the tomb was built, the others years before; the avowal of Dr. Dauphin to plaintiff that the tomb was to be devoted to the uses prompted by his affection for the family, and the reliance upon his assurances evinced by the consent of plaintiffs to the transfer of the remains, and that Mr. Dauphin caused their names to be placed with his own on the tomb, are, we think, placed beyond controversy by the record. There is left the legal question so elaborately argued.

We appreciate that servitudes exist only for the benefit of immovable property, or the profit and advantage of the living. Civil Code, Arts. 709, 758, *et seq.* We do not perceive any basis to sustain any right of plaintiffs in the nature of a servitude of burial in this tomb. We recognize, too, that the title to immovable property in Louisiana must conform to ownership, and its modifications prescribed by the Code, Arts. 490, 492, 533, 636, *et seq.*; *State vs. McDonogh*, 8 An. 351; *Succession of McCann*, 48 An. 145. The title to burial ground admits of none of the modifications established for the advantage of estates or the uses of individuals. The title to this tomb is in the legatees of Dr. Dauphin, as it was in him in his life. *McEnery vs. Pargoud*, 10 An. 497; *Burke vs. Wall*, 29 An. 46. The plaintiffs assert no title to the property. They demand only the injunction to restrain the removal of the remains. While we recognize the title of the legatee of Dr. Dauphin, the inquiry is whether, consistently with that title, the plaintiffs by the acts of Dr. Dauphin are not entitled to prevent the removal, the subject of discussion.

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The disturbance of the remains of the dead except for lawful necessary purposes, is not encouraged. With due regard to the sentiment on that subject as well as public policy, courts have enjoined disinterments and even denied the enforcement of a mortgage upon burial ground. 33 Pennsylvania, 422; 8 Abbott (N. Y.), 159, cited in 12 U. S. Digest, No. 124, and other similar types of authority are to be found in the decisions of the courts of other States. It is needless to dwell on the assurances of Mr. Dauphin and their acceptance by plaintiffs under which their dead were removed by Mr. Dauphin and deposited in his tomb. There was by his words and still more by his conduct, the manifestation of his purpose that the remains of the Choppins should have a final resting place in this tomb, and on the faith of that purpose so distinctly avowed, these plaintiffs permitted the transfer of the remains of their dead. In our view, after all this Dr. Dauphin could never have made the demand so violative of good faith and repulsive in all respects, as that which this suit supposes was advanced by his legatee. The principle of estoppel so often applied in controversies involving pecuniary rights, will not permit the withdrawal of promises or engagements on which another has acted. It seems to us that the principle can well be applied to this controversy. To disturb the mortal remains of those endeared to us in life sometimes becomes the sad duty of the living. But except in cases of necessity, or for laudable purposes, the sanctity of the grave should be maintained, and the preventive aid of the courts may be invoked for that object. The remains contained in the tomb, the subject of this controversy, having been laid away under the assurances of final repose, shown by this record given by the tomb owner, must, in our opinion, hold good against his heir, as they would have been maintained against the owner in life. While the title to the tomb is in the heir, she is, in our view, concluded by the acts and conduct of Mr. Dauphin from disputing the plaintiffs' right to require that the tomb shall remain now as designed by him, the sepulchre for the remains now in it of the deceased members of the Choppin family.

It is claimed plaintiffs had no right to enjoin. The letter from Dr. Dauphin's legatee, that caused the injunction, announced her purpose to sell the tomb, offering it first to plaintiffs. The letter implied the exclusive power of the legatee over the tomb, and to sell involved, as the plaintiffs understood and appreciated, the removal of

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the remains. We think that appreciation was natural. The petition for the injunction asserting the right to the tomb as the supulchre for the remains was met by the answer, not disclaiming the purpose attributed to the heir in the petition, but denying the right asserted by plaintiffs, and insisting that the remains placed in the tomb by the kindness of Dr. Dauphin were there only by sufferance. If, as we maintain, it was competent for the plaintiffs to require that the remains should continue in the tomb, they had the right to enjoin the removal, and, however intended, the letter sent them, in our view, authorized their apprehension of that removal. The issues and discussion of the controversy have required from us a decision of the question on the theory that the removal of the remains was proposed on the one hand and resisted on the other. While we are required by the pleadings and discussion to deal with the case as exhibiting this complexion, it is proper to say that no purpose of this removal was ever entertained by Dr. Dauphin, and any such purpose on the part of his heir has been disclaimed in the argument. We think, however, that the plaintiffs, placing a reasonable interpretation on the letter of the heir, were entitled to the injunction.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

ON APPLICATION FOR REHEARING.

The original opinion in this case maintained that cemetery lots did not part with the character of immovable property, because devoted to burial purposes. Under our law whatever its uses, land is immovable. The Code completely effaces the distinction of "things holy, sacred and religious." Civil Code, 452, 456; *McEnery vs. Pargoud*, 10 An. 497; *Burke vs. Wall*, 29 An. 46. The opinion, therefore, necessarily recognizes the title of Mrs. Dauphin, the legatee of her husband, to the lots bought by him and left at his death to her.

The opinion affirmed, of course, there could be no servitude, usufruct or other modification of ownership of burial lots. There is no servitude, in the legal sense, established on property for the interment of the dead, and the usufructs of the Code are for the profit and advantage of the living. There was also the recognition in the opinion of the prohibition in the Code enforced in our jurisprudence of every species of tenure of property except ownership

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in its fullest significance, and its modifications carefully prescribed by the Code. Arts. 488, 490 *et seq.*; 533 *et seq.*; 646 *et seq.*; State vs. McDonogh's Succession, 8 An. 251; Succession of McCann, 48 An. 145.

The court, then, in this case is dealing with lots, title to which is in the defendant with no form of subdivision of ownership vested in plaintiff, or in any, save the defendant. Consistently with her title and the absolute exclusion by the law of all tenures of property, except those recognized by the Code, the inquiry presented itself how could this court sustain that right the plaintiffs assert to these lots? In what part of the Code is that to find a place? If admitted to the extent asserted, must it not be deemed simply and only of our creation? It is the claim of plaintiffs that Dr. Dauphin, under whose will his widow, the defendant, inherits these lots, by words, letters and conduct quite as expressive as language promised that the tomb he erected on the property should be the final resting place for the remains of his friend, Dr. Choppin, and the remains of the deceased members of the family, as well as for the remains of other members of the connection when their turn came to die. This right asserted at present and for the future, is to subsist alongside of the title the Code recognizes to the property. If admitted, the right is purely of judicial creation. The asserted right carries the use of ownership applied to burial lots, but is entirely foreign to our system.

We were therefore thus confronted in our consideration of this case, with the legal title to this property in the defendant, and another species of interest or form of title, claimed to have been brought into existence by the declarations and conduct of Dr. Dauphin in his lifetime, but not within the recognition of the Code. We reached and adhere to the conclusion that the right, at least to the extent asserted, could not be allowed.

But we found there was a basis consistent with our law on which the plaintiff was entitled to part of the relief sought. In the lifetime of Dr. Dauphin the remains of Dr. Choppin and of the deceased members of the family had been placed in the tomb under the promise on Dr. Dauphin's part they should remain there. In our view, wholly irrespective of any issue of title, neither Dauphin in life or his legatee after his death could recall that promise and require the removal of remains deposited on the faith of this pledge of final sepulture. The petition attributed to defendant the design of re-

removal of the remains, a purpose never contemplated by Dr. Dauphin and disavowed for his widow in the argument in this court. Still, the plaintiff had issued the injunction on the belief of its necessity, not without reasonable cause, as it appeared to plaintiff. Our purpose was to confine the relief to maintaining the injunction against removing the remains. The decree of the lower court affirmed by us goes beyond the relief proposed in our opinion, and on this rehearing we are asked to make the decree conform to the opinion. After the additional argument on this application and on the maturest reflection we remain of the conviction that perpetuating the injunction against disturbing the remains now in the tomb must be the limit of the decree.

It is therefore ordered, adjudged and decreed that our former judgment in this case be set aside and annulled, and it is now ordered, adjudged and decreed that the judgment of the lower court, in so far as it enjoins and prohibits the removal from the tomb of the remains of Dr. Choppin, Mrs. Eliza Choppin, Arthur V. Choppin and Amedee Choppin, now in the tomb, be affirmed and the injunction decreed to be perpetuated, to that extent: it is further ordered and adjudged that in all other respects the judgment of the lower court be and is hereby avoided, annulled and reversed, and that appellees pay costs of appeal; those of the lower court to be borne by the appellants.

No. 12,176.

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THE H. B. CLAFFLIN COMPANY VS. I. H. DAVIS.

Issues decided in a case, unless manifestly erroneous, must control all the subsequent steps in the case.

APPPEAL from the Second Judicial District Court for the Parish of Bienville. *Watkins, J.*

L. K. Watkins, A. H. Leonard and F. G. Thatcher for Plaintiffs, Appellants.

B. P. Edwards and I. A. Dormon for Defendant, Appellee.

Claffin Co. vs. Davis.

Argued and submitted June 5, 1896.

Opinion handed down June 22, 1896.

Rehearing refused June 30, 1896.

The opinion of the court was delivered by

BREAUX, J. The plaintiff, a day after two of defendant's creditors had obtained writs of attachment, sued out a writ of attachment against defendant, and caused to be re-attached, and to be seized and sold a stock of goods and other property of the defendant.

The attachments were issued under Art. 240, C. P., fourth and fifth clauses.

In one of the first cases of attachment, that is, the case of Winter vs. Davis, the plaintiffs, here, intervened, alleging substantially that Winter's attachment was fraudulent and collusive, and sued out with the consent and connivance of Davis, and that the effect was to give an unfair and unjust preference to the former, Winter. The intervenors also denied that Davis was indebted to Winter.

The intervenors asked for a judgment in their petition, avoiding, annulling and setting aside the writ of attachment sued out by the plaintiff Winter, against the defendant, Davis.

Each, Winter and Davis, in a separate answer denied the charge preferred. The defendant in the case (viz., the case of Winter vs. Davis) filed motions to dissolve, on the ground that the affidavit was untrue.

When this motion was taken up for trial, by consent; all the attachment cases were consolidated.

Evidence was heard contradictorily with all the interested parties. The District Court dissolved the attachment.

The plaintiff in the case of Winter vs. Davis and the plaintiff in the case here took an appeal to this court. The former furnished bond and prosecuted his appeal to this court.

On appeal the judgment of the District Court was affirmed. 48 An. 160.

After it had been affirmed the plaintiff in the case now under consideration obtained another order of appeal, furnished bond and is before this court as appellant.

Here the appellee filed a motion setting forth that the issues involved in this case were involved in the case of Winter vs. Davis; that the evidence is the same; that as consolidated cases the tran-

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script of the Winter-Davis case, now in the clerk's office of the court, should be considered as before the court in the present case.

The facts as relate to the attachment being as alleged in this motion, there can be no reasonable objection to the motion.

The two transcripts are before us and constitute the complete record of the case.

We pass to the grounds urged by the plaintiff here in support of its attachment. The first is that defendant's connection with Winter, under the circumstances presented by the record, made strong grounds of themselves for the attachment.

The issue was raised in the decided case of Winter vs. Davis, by the intervention of the plaintiff here; evidence was admitted to prove the alleged collusion between Winter and Davis.

The point was not directly decided in the lower court; it was decided that the other facts appearing of record were not of such a character as to enable the plaintiff to sustain an attachment.

In the case here the judgment of the District Court disposed of that issue in that court, and held that the charge of collusion and fraud was unfounded.

The issue raised, although not decided by us, received some attention in our previous opinion.

The evidence did not impress us in the Winter-Davis case as proving the corruption and fraud charged between the attaching creditor and the debtor.

A second examination, after having heard argument in the present case, has not convinced us that the conclusion reached heretofore, but not expressed, on this point, for there was no necessity, was erroneous.

The plaintiff held defendant's notes for the amount of his claim. The purpose of the advance represented by these notes was stated; not a fact of record suggests the unreality of the transaction; all the evidence sustained the claim. There is no basis supporting the presumption suggested by the plaintiff.

We leave this point (not decided in the Winter case) and take up the other questions.

It devolves upon us first to determine whether they should again be reviewed and whether they should be reversed as erroneous.

It may be that the defendant transgressed business rules in the management of his business. He was a young man when he went into business on his own account. It was his first business venture.

He had, when he opened his store, about four thousand dollars. With this limited amount as a basis he undertook to carry on a large business. The approaching day of payment may have caused uneasiness, followed by some trepidation to save something from the financial misfortune threatening.

To us it seemed that he was actuated by a desire to save the business. The sales were made in due course of trade, and the amounts realized were reinvested in his business. Impressed by these facts we affirmed the judgment of the District Court. The same parties can not be allowed to contest the same matters in another suit.

It has often been announced, and is now well settled, that questions decided on appeal should govern the case in the same court; through all the subsequent phases of the proceedings.

It will seldom be reconsidered or reversed. Wells, *res judicata*, p. 569. This conclusion is reached; although strictly considered, *res judicata* is not pleaded.

Not the debtors only, who are inspired by a desire to deliver all their property (the unselfish capable of ceasing to have themselves in mind and even sacrificing themselves in order to meet, as far as possible, all just demands) are free from the process of attachment. These qualities are highly desirable in everything. But are not the only standard. The test is more particularly fraud on the part of the debtor, or the intention to defraud (not found against defendant in our previous decision). We add, that too hasty action on the part of creditors will not always prevent fraud and encourage good faith. If there was any fraud in his case it was concealed, and not brought to light in the first trial.

Here, after having considered only the evidence admitted in the case (contradictorily with the defendant in the former trial), we have found no reason to change the conclusion previously reached.

The attachment having been dissolved, upon final hearing, the defendant claimed damages.

The amounts allowed, \$250 fee of attorney and \$60 portion of wages paid clerks and book-keeper during the time of seizure under the attachment, to operate as credit on principal demand, are reasonable and fair compensation.

This disposes of all the issues. We are firm in the conviction that the judgment should be affirmed.

Judgment affirmed.

No. 12,123.

G. PASCAL & CO. VS. C. NUMA FOLSE ET ALS.

After a decree of separation of property if the husband disposes of and converts to his own use the separate property of his wife, she has a legal mortgage against the property of the husband for reimbursement.

Where authority has been given to the wife to borrow money by the judge, and she does so and it reaches its proper destination, she will be liable for the amount, notwithstanding no note or mortgage was given to secure the amount.

A PPEAL from the Twentieth Judicial District Court for the Parish of Assumption. *Guion, J.*

L. F. Suthon for Plaintiffs, Appellees.

Howell & Martin for Defendants, Appellants.

Argued and submitted May 21, 1896.

Opinion handed down June 1, 1896.

Judgment amended and rehearing refused June 25, 1896.

The opinion of the court was delivered by

McENERY, J. The defendant and her husband owned in indivision the Pothier plantation, in Assumption parish. They were separate in property. The husband cultivated the plantation on his own account until the year 1890, when he became indebted to the plaintiff in a sum, in round numbers, of five thousand dollars. They declined to give further advances without security. In 1890 the wife was authorized, strictly in accordance with law, to borrow two thousand five hundred dollars to cultivate her half of the plantation. The permission was for her to borrow the money for the purpose of cultivating alone her half, and to grant the necessary mortgage to secure the amount of the advances. It is urged that the mortgage was granted through marital coercion. The testimony does not justify the assertion. The accounts for the whole plantation, which was supplied by plaintiffs, were kept against the husband, as plaintiffs state, as the managing partner or agent of the joint venture of husband and wife. The accounts against the plantation show that the crops of 1890 were in excess of the advances, and there was to

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Pascal & Co. vs Folse et als.

the credit of the plantation the sum of one thousand six hundred and twenty-four dollars and fifteen cents. The note was thus paid and the mortgage given to secure it, of course, satisfied.

In 1891 the wife again appeared before the District Judge to be allowed to borrow money, and to execute the required mortgage to secure the same on her one-half interest in the plantation for that year. Pascal & Co., the plaintiffs, made the advances, but instead of signing a new note and mortgage, the note which had been paid was extended and the mortgage was attempted, by the endorsement, to be kept in force. The note has been paid and satisfied and the mortgage extinguished. It could not thus be revived by the wife, and made to serve the purpose of a new note and a new mortgage under the last order given by the District Judge. There is no analogy in this case to that of *Levy vs. Ford*, 41 An. 873, and the cases referred to therein. In the latter, the note secured by mortgage had been given as collateral security for a debt which had never been extinguished to the knowledge of the holder, as in the instant case. Here the debt for which the note and mortgage were executed was extinguished.

But there was the authority of the judge for the wife to borrow the money, and if, under this authority, it was borrowed, it matters little whether or not the creditor availed himself of the order, granted to secure the debt by mortgage. It would only be against him in the case of a conflict with other debts secured by mortgage. The evidence shows that supplies were furnished under the authority to borrow, and that they reached their proper destination.

In the year 1886 the husband mortgaged to his wife his half of the Pothier plantation to secure the sum of one thousand eight hundred and forty dollars, the proceeds of certain immovable property belonging to his wife, which he appropriated to his own use. The entire transaction is detailed and set forth in the mortgage. As a conventional obligation between husband, and wife it was null and void, but as a legal mortgage it is valid, if the legal mortgage can exist after a separation of property against the husband in favor of the wife for the appropriation of her separate funds. *C. C. 3849. Delesdernier vs. Delesdernier*, 45 An. 1865; *Burns vs. Thompson*, 39 An. 377.

Proceedings were commenced by plaintiffs to foreclose their mortgage on the plantation.

Pascal & Co. vs. Folse et als.

In the case of Ratcliff vs. Folse the plantation was sold under a first mortgage. It realized seven thousand and thirty dollars, and, after paying the debt and costs, there was left in the hands of the sheriff for distribution three thousand four hundred and fifty-six dollars and seventeen cents. The second mortgage creditors are now contending for the distribution of this fund.

Pascal & Co. claim the entire amount, because of the indebtedness of the husband to them for supplies for his undivided half and for supplies furnished his wife, under and by virtue of the authorization of the judge. For the amount due by the husband the wife claims that her legal mortgage is superior to the mortgage of Pascal & Co. on his half of the plantation, and that she should be credited with one-half of the amount credited to the place for the crops of 1890.

In case of Succession of Gayle, 27 An. 550, it was held that after a decree of separation of property, which had been executed, no legal mortgage could be created by the conversion by the husband of the wife's separate property, and that she must look to him as her agent in the management of her property, and that his responsibility springs alone from this capacity. There is no authority cited for the doctrine announced by the court, and we are constrained to say that it is in conflict with the textual provisions of the Code and the policy of our jurisprudence. Art. 3319, Sec. 8, gives a legal mortgage in behalf of the wife for the restitution or reimbursement of her paraphernal property. There is no exception stated. It is granted in unequivocal language, and makes no distinction as to whether there is or not a separation of property. We see no reason why there should be a distinction or difference. The mortgage is given to the wife, because being under the power and dominion of her husband, and her incapacity to contract without his intervention. The mortgage springs from the fact that she is the wife, not because she has had restored to her the administration of her paraphernal effects. This administration she can resume at any time without a judgment of separation, yet it will not be contended, because she has resumed this administration of her separate property, she would lose her mortgage in case the husband should dispose of these effects. The legal mortgage of the wife springs from the same source as the tacit mortgage in favor of minors and interdicts, and this source is their incapacity.

In the marriage contract it can be stipulated that there shall be a

State ex rel Kennedy vs. Sheriff.

separation of property, yet we find that the wife has a legal mortgage on the immovables and a privilege on the movables for the restitution of her dowry, as well as for the replacing of her dotal effects which she brought at the time of her marriage, and which were alienated by her husband, and this from the time of the celebration of the marriage, and for the restitution of dotal effects acquired during the marriage. C. C. 2876.

The separation of property and dissolution of the community is intended to place the wife in possession of her separate estate so as to rescue from the imprudent management of the husband, and to enable her by judgment to enforce her claims against the husband. It in no way diminishes the incapacity of the wife, or gives her any of the privileges of a *femme sole*. She can not alienate her separate property without the authority of the husband, or that of the judge.

In 1892 the plantation owed plaintiffs seven thousand and seventy-five dollars and twenty-six cents, but of this amount Mrs. Folse owes seven hundred and seventy-four dollars and eighty-five cents, which is obtained by deducting the amount of five thousand one hundred and ten dollars and ninety-nine cents, and four hundred and fourteen dollars and fifty-six cents interest on same individually due by the husband to plaintiffs.

Her half is to be charged with this amount. The husband's half is to be charged with the amount of her legal mortgage.

The judgment is amended in accordance with this statement, and in other respects affirmed, appellees to pay costs of appeal.

No. 12,218.

STATE EX REL. JOSEPH KENNEDY VS. WM. E. UNIACKE, CRIMINAL
SHERIFF FOR THE PARISH OF ORLEANS, ET AL.

Where a party has been indicted and his counsel suggests his insanity before trial, and a commission is appointed to inquire into his mental condition and reports him to be insane, and the jury returns a verdict accordingly, and the judge of the Criminal District Court remands him to the parish prison, without a commitment to the insane asylum, the judge of the Civil District Court has authority, under Sec. 1768, R. S., to inquire into the facts and circumstances of the case, and if, in his opinion, he is dangerous to the citizens and the peace of the State, to commit him to the insane asylum of the State.

PETITION for Writs of Prohibition and *Certiorari*.

State ex rel. Kennedy vs. Sheriff.

James J. McCann for Relator.

J. Q. Flynn for Respondent.

Submitted on briefs June 29, 1896.

Opinion handed down June 30, 1896.

The opinion of the court was delivered by

McENERY, J. The relator was under two indictments in the Criminal District Court. Before the causes were fixed for trial, relator's counsel filed a motion suggesting the insanity of the accused.

A commission was appointed by the judge of said court to inquire into his mental condition. This commission reported that he was insane. The question of his insanity was submitted to a jury, and they returned a verdict that he was insane, after which he was remanded to the parish prison.

Application was then made to the judge of the Criminal Court, by the person upon whom the accused had made a murderous assault, and for which he was indicted, under Sec. 1768, R. S., to examine into his mental condition, and that if found insane, to commit him to the insane asylum. To this proceeding the relator's counsel filed a plea to the jurisdiction of the court, and he was again remanded to the parish prison. Application was then made to the Civil District Court, under the same section of the Revised Statutes, for the interdiction of the accused, to which proceeding relator's counsel again filed a plea to the jurisdiction of the court, which was overruled. A judgment of interdiction was rendered, and the accused ordered to be taken to the insane asylum.

The relator, through his counsel, applied to this court for writs of *certiorari* and prohibition, the object of the proceeding being to annul the order of the judge of the Civil District Court.

It is contended by relator that under Sec. 1778, Revised Statutes, the judge of the Criminal District Court was authorized to commit the accused to the insane asylum when he had been acquitted by a jury, or there had been a failure to indict him by the grand jury and he had been discharged and was dangerous to the safety of the

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citizens or to the peace of the State, and that the Civil District Court has no jurisdiction to make inquiry as to the sanity of the accused, because it would be divesting the Criminal District Court of its jurisdiction over the indictments against the accused. The record does not show that a plea of insanity was entered averring that the accused was insane when he committed the crimes for which he was indicted. In such a case, Sec. 1780, Revised Statutes, would apply. The Criminal District Court does not, under the facts as stated, lose its jurisdiction over the indictments against the accused. If he recovers from the insanity, and if it be a case where the insanity developed after the crimes were committed, the cases against the accused are to be continued until after his recovery, when he can be brought to trial.

The facts, as stated, bring this case directly under the Sec. 1768, Revised Statutes, which says: Whenever it shall be made know to the judge of the District or Parish Court by the petition and oath of any individual that any lunatic or insane person within his district ought to be sent to or confined in the insane asylum of this State, it shall be the duty of said district or parish judge to issue a warrant to bring before him, in chambers, said lunatic or insane person, and after proper inquiry into all the facts and circumstances of the case," to commit him, if, in his opinion, he ought to be sent to the insane asylum.

The relator's counsel pleaded his insanity, but objects to his being sent to the insane asylum, urging a want of jurisdiction in both courts to inquire into his insanity for this purpose. Both courts had jurisdiction, and the Criminal District Court having failed to make the necessary commitment, the Civil District Court found a lunatic within its jurisdiction who was dangerous to the community and to the peace of the State, unprovided for, and it was its duty to commit him to the asylum.

The relief prayed for is denied and the rule granted herein discharged at relator's costs.

No. 11,928.

EDWARD TALLE ET ALS. VS. MRS. WIDOW N. ANTONIO DE MONASTERIO ET ALS.

On the appeal of the plaintiffs in the lower court, the defendants neither appealing or asking any amendment of the judgment in the mode pointed out by the Code, can obtain no change or reversal of the judgment of the lower court. C. P., Art. 989, 989, 990; 1 An. 140; 5 Ann. 310; 10 An. 397.

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A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Samuel L. Gilmore and Theo. Cotonio for Plaintiffs, Appellants.

Horace E. Upton and Anatole A. Ker for Defendants, Appellees.

Action for the annulment of a sale of certain property situated in the city of New Orleans made by the State Tax Collector, and adjudicated to the State of Louisiana on the 14th of August, 1875; and also conveyed by said Tax Collector to one N. Antonio De Monasterio on the 17th of August, 1875, by an authentic act. And further to annul the act of confirmation of said Monasterio's title by the State Auditor, bearing date February 25, 1876, and to decree plaintiffs the owners thereof.

The judgment of the District Court decreed the plaintiffs owners of the property in controversy.

On appeal the case was argued and submitted, March 10, 1896, and the judgment of the District Court was reversed.

The opinion of the court was delivered by WATKINS, J., and handed down April 6, 1896.

On April 18, 1896, a rehearing was granted.

On the rehearing the case was argued and submitted June 15, 1896.

Opinion handed down June 25, 1896.

The opinion of the court was then delivered by

MILLER, J. The judgment of the lower court was in favor of plaintiffs for the property claimed by them in this suit, and against them on their claim for damages caused by eviction, and for rents of the property for the period it is claimed defendants have had illegal possession. The defences were that defendants, the widow and heirs of De Monasterio, were owners under a tax title conveyed by the State to him years before the suit was brought; that subsequently plaintiffs, or one of them, rented the property from him and is thereby estopped from disputing the title of his widow and heirs; there were defences of prescription against plaintiffs' demands, and defendant claimed in reconvention an alleged indebtedness of the

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plaintiff, Edward Talle, to De Monasterio, existing when the tax sale was made. On these issues the lower court rendered its judgment, from which there was no appeal by defendants. The appeal was by plaintiffs.

On this rehearing our attention is directed to the finality of the judgment in plaintiffs' favor for the property, and that the plaintiffs' appeal brought before this court only the demands of plaintiffs for rents and damages. It is therefore insisted our judgment is erroneous in setting aside plaintiffs' judgment for the property.

The appeal submits to this court the errors in the judgment which the appellant conceives operate to his prejudice. If the other party to the suit complains of the judgment, to obtain relief he must appeal, or answering the appeal of his adversary, claim an amendment. It results that this court on the appeal can not disturb the judgment except to the extent asked at our hands by the appellants, unless there is an answer from the appellee demanding an amendment of the judgment. In other words, the judgment of the lower court becomes final as to the party who takes no appeal and asks no amendment in the mode pointed out by the Code of Practice. In this case there being no appeal by the defendant and no answer by them to the appeal, the judgment of the lower court, in favor of plaintiffs for the property, could not be called in question on this appeal of the plaintiffs or disturbed by us. Code of Practice, Arts. 888, 889, 890; Succession of Hillsberg, 1 An. 340; Succession of Decoux, 5 An. 140; Wortham vs. Schenck, 10 An. 197.

We have given attention to the argument of defendants that their defences of prescription made in the lower court against the demand for the property should be considered as filed here, because the Code authorizes such defences on the appeal. O. P. 845. But the provision of the Code in this respect secures the right to make such defence with reference to the issues brought up by the appeal. The case cited by appellees, *Miller vs. Mercier*, 3 N. S. 229, maintains that this court on appeal may enforce defences or sustain grounds not disposed of by the lower court. No doubt of that. But the demands in respect to which such grounds or defences are assumed or urged must be before us. Neither the Code or the decisions sustain the contention that because of the plea of prescription filed here or deemed renewed, we can touch a judgment neither appealed from or sought by answer to be amended by the party urging the prescription.

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On the question of damages for eviction claimed by plaintiffs, in our view the action is prescribed. The unlawful deprivation of the possession of the premises, as the plaintiffs describe the act on which they base their claim for damages, was clearly subject to the prescription of one year long since accrued. Civil Code, Art. 3536. The plea of prescription in that respect is before us, and we sustain it. The prescription against the claim of plaintiffs for rents and revenues, we think, should be reserved. This is a petitory action by plaintiffs for the property and rents during the period of defendant's illegal possession. To what extent the claim for rents is to be deemed the incident of the petitory action, or in any aspect is to be sustained, we think should be reserved.

It is therefore ordered, adjudged and decreed that the judgment of this court, previously rendered in this case, be set aside and annulled. It is further ordered, adjudged and decreed that the judgment of the lower court, in so far only as it dismisses and rejects plaintiffs' demand for rents and revenues, be annulled; said judgment, in so far as it decrees plaintiffs the ownership of the property, and dismisses defendants' reconventional demand, being left in full force and untouched by this decree, and it is further ordered and decreed that as to rents and revenues of said property, the right to claim which is reserved to plaintiffs, that this case be remanded to the lower court for further proceedings and another trial, and that defendants pay costs.

DISSENTING OPINION.

WATKINS, J. This is a petitory action for the recovery of improved property and the rents and revenues thereof; and the defendants set up title in themselves and make claim for improvements and taxes. On the trial in the lower court there was judgment in favor of the plaintiff for the property, making no allowance for rents and revenues on the one side, nor the value of improvements and taxes on the other; and from that judgment the *plaintiff* procured an order of appeal, general in its terms, and without having previously applied for a new trial; and in this court the defendants and appellees filed no answer to the appeal, and consequently requested no amendment of the judgment appealed from.

Under this state of facts the question arises as to *what* issues are presented to this court for decision; whether plaintiff's appeal

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brought up the *whole case*, or only the question of rents and revenues. For, if it brought up the whole case, it occupied the same position it did in the lower court, and there was no occasion for the appellee to have answered; but if, on the contrary, the appeal only brought up the questions of rents, improvements and the value of vegetables, etc., destroyed, the appellee should have answered the appeal and requested an amendment of the decree recognizing his title.

Entertaining the belief that plaintiff's appeal brought up the whole case, our opinion dealt with the whole case, reversed the judgment appealed from and decreed the defendant to be the owner of the property in dispute.

There being a division of opinion amongst the judges as to whether the judgment was before us with respect to the title, a rehearing was granted, and the attention of counsel on both sides was directed to this point.

Consulting the record we find that the judgment of the District Court passed upon and decided no other issue than that of title; and it left undecided all other issues raised by the pleadings.

There was no judgment to appeal from, other than that with reference to the title. If, in point of fact, the plaintiff did not appeal from that judgment, there was no judgment from which he could have appealed, at all; and if that judgment has not been brought up for review, there is no appeal before this court, and nothing presented by the record upon which this court can rest a decree or found its jurisdiction.

An appeal is an act whereby one of the parties to a suit has recourse to a superior tribunal "in order to have the judgment of an inferior court corrected." C. P. 564.

And the law expressly provides that this court "can only exercise its jurisdiction in so far as it shall have knowledge of matters argued or contested below." C. P. 895.

And this court said in *Miller vs. Gilmore*, 33 An. 1404, that "in the exercise of its appellate powers, this court reviews the judgments of the lower courts, to affirm, reverse or amend them, or to remand a case.

"We can not, in the present phase of the action, decide what the rights of the parties are, for that would be assuming and exercising an original jurisdiction which we do not possess in this class of cases.

"This court can exercise its appellate jurisdiction only in so far as it shall have knowledge of the matters argued or contested below."

It is apparent from the record that nothing but the question of title was decided in the court below; and as, in the exercise of its appellate jurisdiction this court can not deal with anything in the case which was not decided in the court below, and can only exercise its jurisdiction to the extent it has knowledge of the matter argued and contested therein, there was no occasion for the defendants to have filed an answer to an appeal, which had brought up for review the only question which had been decided in the lower court.

The decision of the question must largely depend upon the character of the action, and the effect of the judgment which has been appealed from.

A mixed action is defined as being one "which partakes both of the real and personal action, such as a claim for the ownership of real property and also for the fruits it has produced or their value." C. P. 7.

This is the character of plaintiffs' action. It is one and indivisible. The issues were inseparable at the date suit was filed, and up to the time judgment was rendered; but it is contended that it at once became divisible, so as to enable plaintiff to prosecute an appeal as to that part of the case which was *not decided*, and upon which *no judgment* had been rendered, without suspending the decree of the lower court as to the part of the case it *did decide*, or in any manner impairing its effect as *res adjudicata*, from which, in the opinion of plaintiffs' counsel, no appeal was taken.

It has been decided that "the dispositions of Arts. 592 and 888 of the Code of Practice are exclusively applicable to cases in which all the parties have been cited, and all the issues made in the first instance are appealed from." *Girod vs. Creditors*, 2 An. 546.

Now it is manifest that in the instant case "all the issues made in the first instance" were not adjudged in the lower court, and, consequently, were not appealed—not in the opinion of plaintiff's counsel—hence, applying the principle of that decision, the defendants have a standing in this court to question the validity of the judgment which is brought up on appeal without filing an answer, and requesting an amendment of said judgment.

The reason of this rule evidently is that in case there are several

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issues in a case, all of which are decided, some in favor of one or more of the parties, and some against one or more of the parties, and only one of the parties takes an appeal, it is then necessary for those not appealing to answer the appeal and ask appropriate amendments, otherwise the judgment of the appellate court would have to be restricted to the single issue tendered by the appellant.

But when the judgment in the court below is restricted to a *single issue* from which one party appeals, there is no occasion for the other party to answer and ask for an amendment of the judgment appealed from, because the appeal presents the *only issue* that was decided, and upon which the appellate court is bound to pass judgment, one way or the other, if it exercises jurisdiction at all.

Indeed, the Code declares that "if the appellee complain of *some parts* of the judgment of the inferior court, he may, without appealing from the same, pray that it be set aside *in those points* in which he believes that he is aggrieved." C. P. 592.

If the theory of plaintiff's counsel be correct, his clients would have been entitled to a writ of possession for the surrender of the property in litigation, notwithstanding his appeal from the judgment recognizing his title; and if that judgment forms *res judicata* as to the question of title a plea to that effect would have necessarily cut off all recourse of the defendants in this court in respect thereto.

But the record furnishes no evidence as to the issuance of a writ of possession or of a plea of *res judicata* having been filed.

The reason is manifest, and it is that either a writ of possession or a plea of *res adjudicata* in respect to the title, would have utterly defeated the whole action for the property and improvements, the same being one and indivisible; and if this would be the effect of a writ of possession or the filing of a plea of *res adjudicata*, for a like reason why should not the appeal as to one or the other—title or rents and revenues—necessarily bring up the other? There can be no other rational solution of the matter.

As well might it be contended that a plaintiff in whose favor a judgment had been rendered on a promissory note for the principal, pretermittting any expression with respect to the interest, could appeal therefrom and obtain a judgment of this court awarding him interest, and at the same time proceed with the execution of the judgment in the District Court, denying the defendant and appellee's right to be heard in the appellate court, because he had failed to

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answer and pray for amendment of the judgment on the principal demand, no appeal therefrom having been taken.

But to illustrate the fallacy of plaintiff's contention, the efficacy of the plea of *res adjudicata* with respect to the judgment of the District Court would, according to his theory, be made to depend upon the appellee's *answer to the appeal* in this court. But it is difficult to perceive how an answer to the appeal could affect the question of *title*, if indeed it did not bring that question up; or what benefit it would confer upon the appellee to file an answer and request an amendment of a judgment which brought up but one issue upon which the court was bound to pass, or not exercise its jurisdiction at all.

It has been held that a suspensive appeal from a judgment dissolving an injunction does not operate a stay of proceedings on the merits, and in such case this court has declined to perpetuate a writ of prohibition to that end.

State *ex rel.* Butchers' Union vs. Judge, 33 An. 436. But no case can be cited in which relief by prohibition has been refused in such a case as this, where a *portion* of the relief prayed for by a plaintiff in a mixed action is asserted to have become *final* by the self-same decree from which he has *appealed* as to another portion of the relief therein contained.

On the contrary, it has been held that "if a District Judge assume jurisdiction in a case after the appellant has complied with the law which entitles him to a suspensive appeal, he is clearly exceeding the bounds of his jurisdiction." State *ex rel.* Johnson vs. Judge, 31 An. 113; State *ex rel.* Menge vs. Judge, 36 An. 711.

It is elementary that no appeal lies from a judgment before it is signed; and if an appeal has been granted from a judgment before it has been signed the appeal is premature because the judgment is inchoate. Garland's Code of Practice 565, and authorities.

And the converse of that proposition is equally true, that once a final judgment has been signed and an appeal has been granted, and an appeal bond filed, the jurisdiction of the lower court ceases, "and it has no longer authority to take any steps but such as may be necessary to transmit the record to the Supreme Court." 1 Hen. Dig., p. 73, No. 3, and authorities cited therein.

Hence it may be correctly assumed that, in so far as the judgment of the lower court decided the issues raised, it was the legal basis of

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an appeal, having been signed; but in respect to other issues the appeal was premature, because, as to them, it was not signed, and therefor not appealable.

But, if on the contrary, the judgment which was rendered and signed be considered as having embraced all the issues in the case, though some were not particularly specified, then the jurisdiction of the lower court terminated, in every respect, upon the filing of the appeal bond; and, of necessity, this court acquired full and complete jurisdiction over the whole case, and in the exercise of its jurisdiction it correctly sustained the appeal with respect to the rents, and decided the question involved.

An appeal is a constitutional and highly favored remedy, and courts should recognize and maintain the right in every doubtful case.

On the submission of the case the question of title was discussed orally and argued on briefs on both sides. Our opinion refers to the pleadings and the fact that plaintiff had appealed from a judgment in his favor, and treated the appeal as having brought up the entire case for decision.

The unanimous opinion of the court was that on the evidence defendant's title was good, and we reversed the judgment in plaintiff's favor.

And for the first time on this application the right of the defendant to be heard on the *sufficiency* of the appeal is raised. No article of the Code of Practice or decision of this court has been referred to as supporting this highly technical hypothesis. And I can see neither law nor equity in straining a technicality so far, and by so doing turn the defendant out of his house and home.

For these reasons I dissent from the opinion of the majority.

No. 12,122.

SUCCESSION OF R. H. ALLEN.

In case of sale being made of a minor's property during the lifetime of both father and mother, the father may occupy the place of tutor *pro hac vice*, and in such event the law clothes him with the power of a tutor in point of fact and consequently he is dispensed from furnishing security, taking and subscribing an oath, having an inventory taken, or causing a mortgage to be inscribed against himself, and the like.

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When immovable property situated within the jurisdiction of one of the parishes of this State territorially forms the subject of a partition amongst co-proprietors, some of whom are minors domiciled in other States of the Union, the court possessing jurisdiction of the partition suit and proceedings is fully authorized to direct the proceedings of a family meeting to deliberate and advise touching the interest of minors interested who reside abroad.

A PPEAL from the Eighteenth Judicial District Court for the Parish of Lafourche. *Caillouet, J.*

Fenner, Henderson & Fenner for Plaintiffs in rule, Appellants.

Clay Knobloch & Son for Defendants in rule, Appellees.

Submitted on briefs April 23, 1896.

Opinion handed down May 18, 1896.

Rehearing refused June 25, 1896.

The opinion of the court was delivered by

WATKINS, J. This appeal is prosecuted from a judgment making absolute a rule taken by the fathers of the minor legatees of Rienzi plantation to compel acceptance by the defendants in rule as adjudicatees thereof at a private judicial sale of the title tendered them in respect of the undivided interests of said legatees therein—said sale having been made in pursuance of an order of the judge and the recommendations of a family meeting for the purpose of effecting a partition between the co-proprietors thereof.

As presenting a fair synopsis of the facts of the case we append the following extracts from the defendants and appellants' brief, instead of making a statement of our own. Brief, pages 1 to 4, inclusive:

"On the 29th January, 1896, by act before Coulon, notary, Mrs. Bettie Allen, the Allen heirs and Smith heirs, legatees of Rienzi plantation, sold it to J. B. Levert and E. U. Morvant for forty-one thousand dollars, one-third cash and the balance in two equal instalments, represented by notes maturing respectively at one and two years from date, secured by vendor's lien and special mortgage on the property sold.

"Among the vendors the so-called Allen heirs, all being minors,

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were represented by their fathers, who acted as tutors duly authorized by family meetings. Two sets of those minors live in Memphis, Tenn., and the other set in New Orleans, La. The mothers of the minors are still living. The sale, in so far as the minors are concerned, was to effect a partition between the co-owners for reasons fully set forth in the petitions for and *proces verbals* of family meetings.

"After the purchasers had paid the cash and given their notes, both the cash and notes that are to go to the Allen heirs and Smith heirs were under a clause in the act deposited in the hands of the three executors of the last will of R. H. Allen, to be distributed among the Allen heirs and the Smith heirs in accordance with the decree of this Honorable Court, when same becomes final, in the matter of the Succession of R. H. Allen, No. 11,998 on the docket of the court, rendered on the oppositions to the provisional and final accounts filed in the matter of that succession. The decree on those oppositions is now under advisement on application for rehearing, and among other questions presented is the proper distribution of the joint legacy made to the Allen heirs and the Smith heirs of the one-half of Rienzi. Whatever the distributive share of the Allen heirs is, then the defendants in the present case ask that it be held in the hands of its custodians, the executors, until final decree herein.

"In the present case the Allen heirs sue out a rule on the executors as custodians and on Levert and Morvant, purchasers of Rienzi plantation, to show cause why the executors should not turn over to plaintiffs in rule the distributive share that may be fixed by your Honors' final decree on the oppositions to the final and provisional accounts aforesaid.

"Defendants in rule duly notified the executors not to turn over the distributive share of these Allen heirs, minors, in and to the cash and notes given for purchase price of Rienzi plantation, because, since their purchase of the plantation, they have been legally advised that the title which the said minors purported to have passed to them was defective, null and void for the reasons fully set forth in their answer to the rule, viz. :

"1. That the respective fathers of said minors pretended to act throughout the proceedings of family meetings, and in the act of sale by virtue of Art. 222 of the Civil Code as 'being clothed with the powers of the tutor,' but your appearers say that they

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could not thus act, and were not thus clothed, because they failed to have inventories taken and made of the property of the said minors, and failed to have certificate of the amount of said inventories recorded according to law in the mortgage records of the parish of Lafourche, and in such other parishes where the said father might have property.

"2. That the proceedings for family meetings and the family meetings held in the parish of Lafourche, on behalf of the minors of Thomas H. Allen and Richard H. Allen, should have been had and held in the city of Memphis, State of Tennessee, where said minors and their fathers reside; the court of the State of Louisiana, parish of Lafourche, being without jurisdiction *ratione personæ*.

"3. That, even if said family meetings were regularly held, which is denied, and even if the court of the parish of Lafourche had jurisdiction in the premises, which is also denied, that said family meetings should, besides fixing the price, terms and conditions of the sale, have provided for the investment of the funds of the minors, as required by law."

I.

The pertinent provisions of the Code are, viz.:

"Property belonging to minors, both of whose parents are living, may be sold or mortgaged, and any other step may be taken affecting their interest, in the same manner and by pursuing the same forms as in case of minors represented by tutors, the father occupying the place and being clothed with the powers of a tutor.

"An under-tutor *ad hoc* shall be appointed by the court, contradictorily with whom the proceedings shall be carried on." R. C. C., 222.

The foregoing is a new article, first appearing in the Revised Civil Code of 1870; and its effect is merely to put the father—in case both the mother and father are living—in the place and stead of a tutor *pro hac vice*.

Or in the language of that article, "the father (occupies) the place (and is) clothed with the powers of (a) tutor;" but he is not a tutor. The law empowers a father who is thus circumstanced to officiate in the legal proceedings leading up to a partition, to be effected through the instrumentality of a private sale, as though he were tutor for his minor children; but it does not say that he shall

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subscribe any oath, furnish any surety, take any inventory or cause any mortgage to be registered against himself as conditions precedent to his exercise of that function. It simply clothes the father "with the powers of the tutor;" and we are not authorized to extend, or by construction to enlarge its precepts.

II.

This proposition was contended for and decided adversely to defendants' present contention in *Johnson vs. Barkley*, 47 An. 98.

In that case we said:

"The immovable property was within the limits of Louisiana, and the court having jurisdiction of the suit, for partition, was authorized to direct the proceedings of family meetings here in the interest of the minors residing abroad. Not being residents of the State, their residence, for the purpose of the partition and for the family meeting, was at the *situs* of the property. It would be different if they were residents of another parish of the State.

"While this court, perhaps, has referred to judicial proceedings in the interest of minors residing out of the State, as cumulative and adding to the protection of their interest, it was never contemplated that family meetings could be held abroad for the alienation of the immovable property of the minor in this State. *James vs. Meyer*, 41 An. 1100; *James vs. Meyer*, 43 An. 44; *Succession of Lewis*, 10 An. 791; *Bailey vs. Morrison*, 4 An. 523."

We are of opinion that that case was correctly decided, and it is adverse to the defendants' contention.

III.

That the family meeting recommending the sale of the interests of the minor legatees in the realty that was sold should have, also, made some provision for a proper investment of the funds which were realized thereby is, perhaps, true; and such a course would justly conform to our ruling in *Koehl vs. Solari*, 47 An. 890, in which we said:

"Considering that the proceeds will represent the property, the shares of the respective parties in interest are transferred thereto. But to make it certain that the property shall pass free of any encumbrance, we think it best that all of the proceeds of sale shall be deposited in the registry of the court, and there remain until the

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amount coming to the minors shall be actually reinvested upon the order of court upon the recommendations of a family meeting," etc.

According to the foregoing statement both the cash and notes "that are to go to the Allen heirs and Smith heirs were, under a clause in the act (of sale), deposited in the hands of the executors," etc., and in our opinion same ought to so remain deposited until such time as the same shall be invested for the minors in pursuance of an order of court and the recommendations of a family meeting, as a security to the title of the purchasers, and the minors' rights as well.

True it is that the property in question came to the minors as an inheritance by testamentary bequest, and, consequently, unaffected by any legal mortgage against their fathers, respectively, as tutor : yet a large sum of money is to be paid by the defendants therefor into the hands of their fathers as tutors *pro hac vice*, and its investment in some satisfactory manner will prove an additional safeguard to all parties in interest.

It is therefore ordered and decreed that the judgment appealed from be so amended as to require that the purchase price of the interests of the minors remain on deposit in the hands of the executors until the funds are invested pursuant to an order of court and the recommendations of a family meeting, and that as thus amended same be affirmed—costs of appeal to be paid by the appellee.

No. 12,116.

E. CUCULLU, ADMINISTRATOR OF THE SUCCESSION OF FRANCOIS LACROIX, DECEASED, vs. J. M. BILGERY ET AL.

An adjudicatee at judicial sale to whom is conveyed a judgment decreeing the nullity of a tax sale acquires no right, title or interest in the property.

Such a judgment is analogous to one that fixes a *status*, recognizes the capacity of an heir, the right to a homestead, the nullity of a marriage, the validity of a will or the right to a divorce.

Such a judgment, when once pronounced, has accomplished its purpose, and is not subject to execution like a money judgment is.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Frank L. Richardson and Emile Pomés for Plaintiff, Appellee.

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Cucullu vs. Bilgery et al.

Rouse & Grant for Defendants, Appellants.

Argued and submitted May 7, 1896.

Opinion handed down May 18, 1896.

Rehearing refused June 25, 1896.

The opinion of the court was delivered by

WATKINS, J. This is a petitory action for the recovery of certain improved real estate situated in New Orleans, and from a judgment in favor of the plaintiffs the defendants have prosecuted this appeal. A fair synopsis of the issues involved is as follows, viz.:

In 1877 E. T. Parker, administrator of the succession of Lacroix, brought suit against Joseph Bilgery for the annulment and revocation of a tax adjudication and sale to him, of certain properties, and that in suit among others. That suit resulted in a judgment in favor of the plaintiff for the recovery of the property and its rents and revenues, aggregating several hundred dollars; and from that judgment an appeal was taken by the defendants, which was ultimately dismissed by this court in 1894.

In January, 1894, the present administrator of the succession of Lacroix instituted this suit against the defendants for the recovery of the property; and it was resisted, upon the ground that they had acquired at public judicial sale made in the succession of Lacroix, after due proceedings and advertisement, "the claim in said suit, and the judgment recovered by Parker, as administrator of the succession of Lacroix," etc., and that the legal effect of said adjudication was to vest a complete title to the property in them.

A great many questions, more or less interesting and complicated, have been raised and argued by counsel on either side, but which, in our opinion, need not be examined and decided, as, in our conception, the decision must turn upon the question whether title to the property purported to have been passed by the adjudication and sale to defendants.

Referring to our opinion in the case of E. T. Parker vs. Joseph Bilgery et als., 47 An. 1848, we find it to be a fact that the plaintiff's motion to dismiss the appeal was grounded upon the acquiescence in the judgment appealed from by the defendants; and that their acquiescence was alleged to consist in the alleged purchase by the de-

fendants of the aforesaid judgment, from which their appeal was taken during the pendency of the appeal. That upon finding, from the proof exhibited, that this was the real and actual condition of affairs, we dismissed the defendant's appeal; and the legal effect of our finding was, to leave the judgment appealed from in full force, as though no appeal had been taken. Inasmuch as we had much of the testimony before us then which is exhibited to us now, we feel at liberty to make use of the views therein entertained and the facts therein found, in so far as they apply to the question of title *vel non*, as the same parties are now before us.

"The judgment appealed from," our opinion says, "is one obtained by the succession of Francois Lacroix, of which E. T. Parker was administrator, against the succession and heirs of Joseph Bilgery * * * which was rendered and signed on January 31, 1879, now pending on appeal to this court; and judgment decreeing that the succession of Francois Lacroix is the owner of a certain lot of ground, and (to) recover from the widow and heirs of the late Joseph Bilgery the sum of \$999.75 to be paid in certain designated proportions, not necessary to be particularly mentioned. * * * The ground of the motion is to the effect that since taking the appeal the heirs of Joseph Bilgery have acquiesced in the judgment, by attempting to buy said judgment at a pretended judicial sale at public auction, though said sale was without authority, and while the succession, as appellee, was not represented. * * * Appellants appeared and answered the motion to dismiss, and averred and represented that 'the judgment recovered by said E. T. Parker, administrator as aforesaid, from which the appeal herein was taken, and the claim in that suit was sold on the 7th of March, 1879, at public auction by Placide J. Spear, after due proceedings and advertisement, pursuant to an order of the Second District Court for the parish of Orleans made in the succession of F. Lacroix, which court had jurisdiction over the administration of said succession; and the defendants and appellants in this cause purchased the said claim and judgment in said suit, and paid the price of one thousand one hundred and fifteen dollars in cash to said auctioneer.'"

Thus we have it judicially affirmed as a fact—in the opinion of this court as well as in the judicial averments of defendants and appellants in that suit, who are defendants and appellants in this—that the auctioneer adjudicated and the defendants and appellants "pur-

Cuculla vs. Bilgery et al.

chased the claim and judgment in said suit" of E. T. Parker, administrator of the Succession of Francois Lacroix vs. Joseph Bilgery, and not the realty which was involved in that suit. We have it affirmed, also, that the judgment annulled the tax adjudication and sale of the property in suit, and condemned the defendants to make restitution of the sum of nine hundred and ninety-nine dollars and seventy-five cents, as the rents and revenues thereof, and the judgment of this court dismissing their appeal left that judgment in force—subject, of course, to any rights thereon which they had immediately acquired during the pendency of the appeal.

On this statement it is quite evident to our minds that the title to the *property* did not pass to the defendants as adjudicatees at the auction sale.

The judgment decreeing the nullity of the tax sale to Joseph Bilgery did not become absolutely final until our decree was rendered dismissing the appeal; and the judgment itself merely fixed and decided the *status* of the title to the property, and decreed the plaintiff entitled to its revenues. Once this judgment was pronounced, its mission was at an end and its object was accomplished. This judgment had the effect—in so far as the property was concerned—of disencumbering the title of Lacroix' succession of an impediment to the exercises of the rights of ownership; but it was a money judgment to the extent of the rents and revenues that it adjudged the succession entitled to recover, and no further.

In respect to the property the judgment merely fixed its *status*, and, in this respect, it is somewhat analogous to a judgment which recognizes the capacity of an heir, the nullity of a marriage, the validity of a will, or the right to a divorce. In this class of cases, the rendition of the judgment is the final evidence of a right, or title; but, unlike a decree that requires a sum of money to be paid, it is not a proper subject of seizure and sale, separate and apart from the property, the title to which it applies. Such a judgment is only susceptible of execution by means of a writ of possession; and that the defendants had already under their tax title. Consequently, it carried to them no further or additional *insignia* of ownership. In so far as "the claim" of the succession of Lacroix' is concerned—that is to say, the judgment it recovered against the defendants for rents and revenues of the property—it was a legitimate subject of

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seizure and sale; but in this suit it is of no consequence, as it is not an issue, this being a petitory action pure and simple.

We are of the opinion that defendants acquired no title to the real estate in controversy under the adjudication to them in the succession of Francois Lacroix; and for like reason their plea of ten years' prescription is not well founded, because their title is not such as to transfer the ownership of the property, in the sense of Revised Civil Code, 3484.

No. 12,203.

STATE EX REL. WELLS-FARGO EXPRESS COMPANY AND J. J. DAVIDSON, AGENT, vs. R. B. MARTIN, JUSTICE OF THE PEACE OF THIRD WARD OF LAFAYETTE PARISH.

48	1249
52	273
48	1249
117	536

The writ of *certiorari*, issued under the supervisory jurisdiction of the Supreme Court, can not be employed for the purpose of inquiring into the correctness of a judgment, when the forms of law have been followed.

Its only province is to pronounce upon the validity of a judicial proceeding.

ON APPLICATION for a Writ of *Certiorari*.

J. L. Kennedy and *R. G. Cobb* for Relators.

William Campbell for Respondents.

Submitted on briefs June 17, 1896.

Opinion handed down June 22, 1896.

The opinion of the court was delivered by

WATKINS, J. The case of the relator can be most concisely stated in the language of his counsel's brief, from which we have made the following extract, viz.:

"The facts as set forth in the application and shown by the certified copy of the record of the case, A. Cardona, Jr., vs. Wells-Fargo Express Co., J. J. Davidson, agent, on docket of R. B. Martin, justice of the peace, Third Ward, Lafayette parish, are that on or about the 2d May, 1896, a crate of strawberries was sent by ex-

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press to Cardona, a resident of the town of Lafayette, from the railroad station, Iona, in the parish of Calcasieu; said property being valued at one dollar and fifty cents, express charges (thirty-five cents) to be paid by consignee on delivery; that on same day the strawberries were transported to Lafayette, and relator's agent sent them to Cardona's place of residence or boarding house, to be delivered to him by the porter of the office; that said employee was informed that the consignee, Cardona, was absent from the town and would not return for several days, and thereupon relator's agent, Cardona having left no one with power to act for him, sold the goods, which were of an exceedingly perishable nature, for the best price obtainable (one dollar and five cents), and on the return of Cardona about the 8th May, tendered him the balance after deducting the charges of the express company, which amount Cardona refused to receive, but instituted suit for the original cost price of the property and the additional sum of five dollars for attorney's fees, in the Magistrate's Court of Third Ward, Lafayette parish; and on the trial of the cause judgment was rendered for the two amounts, aggregating six dollars and fifty cents and costs, from which judgment no appeal will lie to the District Court.

"The question that presents itself is, whether under Art. 90 of the Constitution this court can exercise control and supervision over the action of the justice of the peace of Ward No. 3 of Lafayette parish, under the state of facts shown by the record in this case."

"It appears from the record that the agent, Davidson, appeared at the trial and defended the case so far as he was concerned. That he was authorized to represent the express company, his employer, is not conceded. The domicile of the Wells-Fargo Express Company in Louisiana is at Nos. 18 and 20 Union street, New Orleans. Cardona, the plaintiff in the case, sued the company in Ward 3, Lafayette parish, on a contract, by the terms of which the express company engaged and undertook to convey certain property from one place to another for a certain sum, or in the event of failure to perform its contract to pay a certain stipulated sum contained in the receipts and agreed upon by the parties as the value.

"The action instituted by Cardona against relator was as to the principal claim—the value of the property expressed—based and founded on the contract, and not an action *ex delicto*."

Again:

"In the next place we complain that the judgment rendered by Mertin, Justice of the Peace, was arbitrary, unjust and without warrant of law.

"It was shown on the trial of this case that relator had complied with the terms of its contract, by transporting and offering to deliver the property to the consignee; that he was absent and would continue to be absent for nearly a week; that he left no agent to receive the freight; that the goods were of a perishable character—in fact, one box of the eight contained in the crate had, before receipt, become rotten and worthless and the remainder would become valueless in twenty-four hours.

"The agent of relator, in order to prevent the entire loss of the consignee's property, sold the same before it had become utterly valueless, as it is shown that it would have done in one more day, and on consignee's return, some days afterward, tendered him the proceeds of the sale, less express charges, to which the company was entitled.

"Now, it is evident that consignee, Cardona, had no cause of action against relator and any judge conversant with the law would have so held. Relator as a common carrier and mandatory of Cardona had certainly 'fulfilled the trust confided to it in a manner more advantageous to the principal' (Article 3011, C. C.) by disposing of the property for his benefit, rather than allow it to become utterly valueless.

"The law authorizes the carrier to dispose of property under the circumstances existing in this case."

Finally:

"Relator's counsel make no contention that a corporation or individual can not be sued for any amount and for any legal cause in the courts established by the Constitution and laws of the State, but they do contend and strenuously urge that individuals can not be permitted to use the courts and forms of law for the purpose of enforcing a claim or cause of action fictitious, illegal and entirely unauthorized by justice, equity or the law of the State; to obtain and execute judgments in such actions, unappealable in amount, and thus practically deprive the selected victim of both right and remedy."

Per contra, the respondent represents that said proceedings are and were not null and void, but that his court had full and complete

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jurisdiction; and that, even if it was without jurisdiction *ratione personæ* in the first instance, that question has been closed by the judgment, which was in said case pronounced against relator without protest or exception on its part—it having joined issue therein by answering to the merits.

He further avers that, in his opinion, the demand and judgment for five dollars as attorney's fees were a proper allowance as "punitive damages for the non-performance of said company's contract of delivery as contemplated by law; and that the proceeding instituted in said case was, in no wise, for the purpose of preventing relator from obtaining justice by an appeal."

He further represents that, on the trial, the amount demanded was clearly established by the evidence.

A copy of the original record of the suit entitled A. Cardona, Jr., vs. Wells-Fargo Express Company, in the respondent's court, has been produced and filed with the transcript in this cause.

That record shows that the defendant was duly cited and that he appeared and, through counsel, answered; and that the parties, plaintiff and defendant, were represented by their respective attorneys during the progress of the trial of said cause.

Judging from the physical appearance and size of the record and from the amount of testimony which is therein contained, the trial must have been an interesting and protracted one—the testimony having been reduced to writing *pro et con*.

After having heard the testimony of the witnesses the respondent prepared his "reasons for judgment," signed and filed them in the record—stating, *in extenso*, what he deemed to be a fair synopsis of the evidence adduced at the trial.

Thereupon he rendered a formal judgment in favor of the plaintiff, decreeing him to have and recover of and from the defendant the sum of six dollars and ten cents, to-wit: one dollar and fifty cents as the value of one crate of strawberries and five dollars as attorney's fees in lieu of actual and punitive damages.

Without taking into consideration the justice or correctness of the judgment rendered, we feel bound to affirm that rarely, if ever, a case has passed under our consideration, coming from any court of limited jurisdiction, which bears, so evidently, the impress of faithfulness and care as that to which we have just adverted; and in our

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conception of this court's jurisdiction under the writ of *certiorari* relator has not made out a case entitling it to relief at our hands.

Primarily, the province of that writ is to "pronounce on the validity of a judicial proceeding. C. P. 828, No. 3; 855.

This writ is granted only in case "the suit is to be decided in the last resort and where there lies no appeal by means of which proceedings absolutely void might be set aside," etc. C. P. 857.

In giving an interpretation of this court's supervisory power under Art. 90 of the Constitution to issue and maintain the writ of *certiorari*, it has frequently held that it can not be employed to inquire into the correctness of a judgment rendered when the forms of law have been followed and when the court had jurisdiction.

That the supervisory power of this court must not be confounded with its appellate jurisdiction. *State ex rel. Matranga vs. Judge*, 42 An. 1089; *State ex rel. Valetton vs. Skinner*, 33 An. 257; *State ex rel. Block vs. Judge*, 41 An. 179; *State ex rel. Chandler vs. Judge*, 43 An. 826; *State ex rel. Wintz vs. Judge* 32 An. 1225; *State ex rel. Patton vs. Judge*, 40 An. 393; *State ex rel. Weber vs. Judge*, 32 An. 1092; *State ex rel. Insurance Company vs. Judge*, 36 An. 316; *State ex rel. Race vs. Judges*, 37 An. 120; *State ex rel. Wood vs. Judge*, 38 An. 377; *State ex rel. Liggins vs. Judge*, 47 An. 1022; *State ex rel. Morere vs. Judge*, 44 An. 1100.

And in the recent case of *State ex rel. District Attorney vs. Judge*, 48 An. 787, all pertinent cases have been carefully collated.

These principles have been frequently applied to judgments rendered by justices of the peace, viz.: *State ex rel. Unbehagan vs. Justice*, 35 An. 365; *State ex rel. Gooch vs. Justice*, 38 An. 968; *State ex rel. Waller vs. Justice*, 47 An. 27; *State ex rel. Broussard vs. Justice*, 39 An. 776.

The authorities are all against the contention of the relator.

It is therefore ordered and decreed that the preliminary writ herein granted be set aside, and that the relief prayed for by the relators be refused at their cost.

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No. 11,954.

J. B. VINET, DATIVE TESTAMENTARY EXECUTOR OF THE SUCCESSION
OF ALEXANDER WEEMS, vs. JOSEPH R. BRES AND JAMES G.
RICHARDSON.

MOTION TO DISMISS.

Where a vendor holding eight notes of \$600 each, secured by special mortgage and vendor's privilege, claiming that a third possessor of the property had assumed payment of the notes, proceeds directly against him, praying for a personal judgment for the amount of two matured notes, asking for recognition of the mortgage as securing all the notes and for a sale for cash to satisfy the amount due, and on terms of credit to correspond with the unmatured instalments, defendants against whom judgment has been rendered in conformity to the prayer, is entitled to an appeal to the Supreme Court, when he denied in the lower court the existence of the *assumpsit* declared on.

A judgment in favor of plaintiff on the issue raised would be *res judicata* against the defendants as to the existence of the whole *assumpsit*.

ON THE MERITS.

Unless the appointment of an executor or curator is absolutely void, acts done by him in such capacity are binding and valid. Mere illegality of such an appointment will not vitiate acts done under it.

Whether a stipulation *pour autrui* has been availed of by the third person for whose advantage same has been made is a question of fact which must be ascertained from contemporaneous and surrounding circumstances, and are not confined to the recitals of the act in which the obligations of the contracting parties are to be found.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Chretien & Suthon and J. C. Gilmore for Plaintiff, Appellee.

R. G. Cobb for Defendants, Appellants.

Argued and submitted on the merits February 27, 1896.

Opinion handed down March 23, 1896.

Rehearing refused June 25, 1896.

ON MOTION TO DISMISS.

Plaintiff alleged that Alexander W. Weems was the owner of a certain body of land in St. Tammany parish; that on the 28th of August, 1890, he sold the same to William L. Wooten for

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six thousand dollars, the price evidenced by ten notes of the purchaser to his own order, and by him endorsed in blank, each for six hundred dollars, maturing at different dates, which notes were secured by special mortgage and vendor's privilege on the property sold.

That on the 12th of January, 1898, Wooten sold the property to the defendants, Bres and Richardson, by act under private signature duly recorded in the parish of St. Tammany; that the consideration of this last sale was part cash and part the assumption by the purchasers of the last nine notes given by Wooten (the first note having been paid), and the assumption of all the obligations of Wooten as purchaser in the act of sale to himself from Weems; that defendants had paid the first maturing of the nine notes assumed by them, and that the remaining eight notes (which he annexed to his petition and made part thereof) were in petitioner's hands and belonging to the succession of Weems, all of which notes defendants had assumed and promised to pay and discharge to Weems and plaintiff; that two more of the notes had matured; that defendants neglected and refused to pay the same.

Judgment was against the defendants, *in solido*, in the sum of twelve hundred dollars, with six per cent. interest from August 28, 1890, until paid, and ten per cent. attorney's fees allowed by the act; recognizing the two notes sued on as bearing vendor's privilege and special mortgage on the property described concurrently with the mortgage notes not yet due; reserving the right of plaintiff, or any or all holders of the unmatured notes therein, and recognizing the vendor's privilege and special mortgage on the said property.

At a later date defendants alleged by way of exception, first, that plaintiffs had shown no cause of action against them in his petition, and secondly they alleged that if the property, of which they admit possession, be bound for the payment of the notes attached to the petition, they denied any responsibility for the payment of the same to plaintiff.

They averred that as third possessors of said property (the mortgaged property), they could not be sued by direct action, but plaintiff must proceed by the hypothecary action; that no notice had been given to Wooten, nor to his representatives, demanding payment; nor had any notice or demand been made upon defendants prior to the

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institution of the suit, for which reason no cause of action had been shown, and the suit should be dismissed.

They admitted in answer the sale by Weems to Wooten, and that Wooten and his heirs and representatives were bound by the terms of the sale and mortgage, but they denied that there had been at any time before, or was then, existing any contract or agreement between Weems and themselves, and denied that they were then, or ever had been, under any obligation to pay Weems or his heirs or representatives the notes signed by Wooten on the 28th of August, 1890; that there has been any novation of the debt contracted by Wooten on that day by the substitution of themselves for the original debtor. They averred that at the time of the contract between Wooten and themselves, Weems refused to novate the debt due him by Wooten, and he never during his lifetime accepted any stipulation for his benefit in any contract between themselves and Wooten; that, on the contrary, knowing the existence of such stipulation at the time it was made, as well as the contemplation of making it, prior to its being made, he failed, neglected and refused to acknowledge or accept the same; they averred that a reasonable time for deliberation upon and acceptance of the terms of whatever stipulation made for his benefit had expired long before his death, and that his legal representatives had no longer any right to claim the benefit of the same as against respondents, except as to the extent of the value of the property held by them, subject to the mortgage executed by Wooten in favor of Weems; they denied any privity between themselves and Weems arising from any contract or obligation entered into between themselves and Wooten, or that any obligation had arisen from any such contract from themselves to Weems, or his representatives, and they further denied any solidarity of obligation in any contract that they may have heretofore made with Wooten.

The District Judge rendered judgment in favor of plaintiff and against the defendants, *in solido*, in the sum of twelve hundred dollars, with six per cent. per annum interest from the 28th of August, 1890, until paid, ten per cent. on the aggregate amount of principal and interest for attorney's fees and all costs of suit, the whole with vendor's lien, privilege and right of pledge on the property described in plaintiff's petition. The judgment further recognized that the two notes sued on, and for which the judgment was given, were secured by vendor's mortgage lien and privilege and right of pledge, con-

currently with the other notes given for the credit portion of the purchase price of said property and not yet due; decreed that the rights of any holder or holders of said notes not yet due be recognized as fully secured by said vendor's lien, privilege and right of pledge as granted by the act of sale, and that said property be sold for cash, in the manner prescribed by law, to a sufficient amount to cover and pay the notes past due, with interest, attorney's fees and costs, and for the balance on such terms of credit as were granted in the original act of sale and secured by all the security clauses and conditions recited in said act as to principal, interest, attorney's fees fixed at ten per cent and costs.

Defendants moved for and obtained an order for a suspensive or devolutive appeal.

Defendants furnished a bond for \$2600 as being for a suspensive appeal. The appeal was dismissed by the District Court as a suspensive appeal on the ground that the appeal bond was too small for that character of appeal.

Plaintiff moved the Supreme Court to dismiss the devolutive appeal on the ground that the matter in dispute is, as to amount, below the appellate jurisdiction of that court.

Appellants urge that "no question is raised by appellants as to the validity of the obligation of Wooten to Weems, the note or mortgage and vendor's privilege securing their payment, nor is there any dispute by appellants of the right of plaintiff to proceed against his obligor personally, or against the property mortgaged *via executiva* for any part or the whole of the debt, and, of course, the amount claimed in such proceeding would fix the jurisdiction, but appellants do dispute and put at issue *the right* claimed by plaintiff in this case to sue them on a contract to which plaintiff's testator was no party, and finally fixed by a judgment in this case their liability and indebtedness for the sum of four thousand eight hundred dollars, with six per cent. interest thereon from 28th August, 1890, whether the whole be due or part.

"Deciding judicially that they owe and are bound to plaintiff for a part of the debt alleged to have been assumed by the contract of 12th January, 1898, between themselves and Wooten, *ex necessitate rei*, would decide and adjudge them debtors personally to plaintiff for the whole amount of the alleged assumed indebtedness due and to become due, and *this fact* of appellants' liability for the entire

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indebtedness of Wooten to Weems, established by the judgment appealed from, would, if sustained, become *res judicata* on this matter.

"It is appellee's *right to sue and stand in judgment* against appellants on a contract by the terms of which more than two thousand dollars is involved, which is denied by appellants, and this constitutes the matter in dispute and not the amount of the notes, either due or to become due, incident of the judgment determining the rights of the parties under the contract."

The opinion of the court was delivered by

NICHOLLS, C. J. Defendants prayed that plaintiff's demand be rejected, and that they be dismissed. They asked no affirmative relief; their prayer was purely defensive. There was no reconventional demand.

Only one judgment was rendered in the case.

It has been sometimes stated that the jurisdiction governing a plaintiff's demand is to be tested by that demand, and not by the defendant's position before the court. *Buisson vs. Staats*, 9 An. 236; *Gustine vs. N. O. Oil Co.*, 13 An. 510; *Flood vs. Shamburgh*, 3 N. S. 626; *Succession of Hoover vs. York*, 80 An. 754.

But defendants maintain that this doctrine has to be taken with limitations. They assert that though plaintiff's present claim may be for a smaller amount than would properly fall under the jurisdiction of this court, yet it is dependent upon the existence and proof of the existence of a contract, which, as to its amount in its entirety, and as to its unpaid instalments, is within our jurisdiction.

That defendant in the lower court put at issue the existence and validity of that contract; that, therefore, the "matter in dispute" for the purpose of appellate jurisdiction, is the amount involved in that of the entire contract, whose existence or validity is so denied, and the unpaid instalments. That although the plaintiff may not (in form) present as a matter for investigation by the court, the existence and validity of the contract, yet he, in fact, tenders that issue as part of his case, and that when defendants' defence is visceral to the attack, the whole matter is thrown open for the court's action.

We have examined the following authorities bearing upon this point:

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Psychaud vs. Weber, 25 An. 183; Lartigue vs. White, 25 An. 291 and 325; State *ex rel.* School Board vs. Cousin, 81 An. 298; Ellis vs. Silverstein, 26 An. 47; State *ex rel.* Holbrook vs. Judge, 24 An. 601; State *ex rel.* Lyons vs. Judge, 21 An. 66; Beirne vs. Gill, 34 An. 7; O'Hara vs. Succession of Davidson, 26 An. 76; State *ex rel.* Bobet vs. Judge, 42 An. 1084; Ready vs. New Orleans, 27 An. 170; Citizens Bank vs. Webre, 44 An. 335.

In the case at bar the plaintiff presented himself as the holder and owner of all the notes remaining unpaid, given by Wooten to Weems. He attached them to his petition; he asserted that defendants had personally bound themselves for the payment of all these notes due and not due through an *assumpsit* of the same, thought they only asked a present personal judgment for twelve hundred dollars.

In spite of defendant's denial of the existence and binding force of this *assumpsit*, they were, by reason of the court's holding it to be valid and binding, condemned personally to pay the partial amount now claimed.

We think the judgment rendered in this case, so far as the question of the *assumpsit* is concerned, would be *res adjudicata* in any future suit between the parties upon the remaining notes amounting to over three thousand dollars. Louisiana State Bank vs. Orleans Navigation Company, 3 An. 294.

The mere division of the purchase price, which defendants are claimed to have assumed, into instalments, did not break the unity or singleness of their own contract, considered from the standpoint of its existence and validity. Nesom vs. D'Armond, 13 An. 294.

Defendants are not parties to the notes; *quoad* them the suit is upon the *assumpsit*.

Should this motion for the dismissal of appeal be sustained, all issues raised below would be withdrawn from our consideration. Should the appeal be maintained and there be any issue in our opinion not cognizable by us, we can so announce on the final decree.

We are of the opinion that the appeal should stand; the motion to dismiss is therefore overruled.

ON THE MERITS.

WATKINS, J. This case is the same one we had before us, and the motion to dismiss which, for want of jurisdiction, we decided on the

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16th of December, 1895, and we refer to our opinion thereupon for a statement of facts applicable to the merits.

I.

The first thing to be considered is defendant's exception to the capacity of J. B. Vinet, public administrator of the parish of Orleans, to be appointed dative testamentary executor of the succession of A. W. Weems, Sr., deceased, his contention being that he had no power or authority conferred upon him by law to qualify or act as executor of said succession, and that he had, consequently, no capacity to institute this suit and stand in judgment.

For this position he assigns as a ground that Weems had no domicile or residence in the parish of Orleans at the time of his death, or prior thereto, and that he had no property situated in said parish at the time of his death. That, on the contrary, he was, at the time of his death, a citizen and resident of the parish of St. Tammany, and had been for a great many years prior to his death, and that his principal establishment was therein situated. That he never had, nor ever acquired a domicile elsewhere, and his succession was opened therein by his death, and that same could not be lawfully administered in the parish of Orleans.

From the foregoing it is clear that the want of capacity alleged consists in the fact that the public administrator of the parish of Orleans could not be legally appointed dative testamentary executor for a succession of a deceased citizen and resident of the parish of St. Tammany; not that his appointment was in itself irregular, or illegal, as not founded upon a proper order of court or the like.

On this question considerable testimony was taken which, in the view we entertain of the legal questions involved, will not be necessary for us to consider, and that view is that unless the appointment be absolutely void his acts can not be questioned by a litigant in a court of justice

In Succession of Dougart, 30 An. 268, it was said:

"As to illegality of the appointment of the executrix it is only necessary to say that the question can not be raised in this indirect and collateral way. Whether legally or illegally done she was appointed and qualified and must be treated as the lawful executrix until her appointment is revoked in a direct action."

In the matter of the estate of Altemus, 32 An. 364, it was said:

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"It seems to be considered, and indeed we do not think it can be denied, that unless the appointment of administrator or curator is absolutely void the acts done by them in such capacities are legal and binding; for it is now elementary that the mere illegality of the appointment will not vitiate the acts done under it. This is so true that the law will not allow a suspensive appeal from a decree appointing such official, but declares that such decrees shall have immediate effect, and, therefore, regardless of the legality or the illegality of the appointment."

In *Cloutier vs. Lemée, Syndic*, 33 An. 305, it was said: \

"Inquiries touching the legality of (the defendant's) appointment are irrelevant. While actually exercising the office he must perform its duties, and the illegality of his appointment will not vitiate his acts." *Citizens Bank vs. Bry*, 3 An. 633; *Gradnigo vs. Moore, Curator*, 10 An. 670; *Dorsey vs. Vaughan*, 5 An. 156; *Beard vs. Gresham*, 5 An. 611; *Succession of Lehman*, 41 An. 987.

On the foregoing authorities we are of the opinion that the defendant can not, in this collateral manner, attack the legality of the executor's appointment, and that he has the undeniable right to institute this suit and stand in judgment, conceding for the argument that the testimony shows that his appointment was illegal on the ground stated.

If every party sued by a succession representative could litigate his capacity, its settlement might be indefinitely prolonged

The judge *a quo* properly overruled the exception.

II.

The principal question for decision is whether, in the sale from W. L. Wooten to the defendants, on the 12th of January, 1893, the latter assumed the payment of the nine notes of the vendor, Wooten, and all of his obligations as purchaser of the property from the deceased

They deny that they incurred any personal liability for the payment of those notes to Weems, the deceased, or to his executor since his death; and aver that they are third possessors of the property mortgaged to secure their payment, the enforcement of which can only be obtained in an hypothecary action. Or in other words, while they admit the binding force of the recitals of the deed under which they acquired the property, and that they became thereby bound for the amount of their vendor's debt and mortgage as part of

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the price they agreed to pay therefor, they aver that there has not been at any time, nor is there now, any agreement or contract on their part "to pay to the said Weems, deceased, or his heirs or representatives, the notes signed by W. L. Wooten, on the 25th of August, 1890," etc.

They further aver that the stipulation of said deed did not constitute a novation of the debt by the substitution of themselves as debtors in the place of Wooten, the maker; and that during the lifetime of Weems they were never so considered, accepted or treated by him.

It appears from the act of sale that Wooten conveyed the property to the defendant with full subrogation to all of his rights and actions against all previous vendors, for the price of six thousand seven hundred and ninety-nine dollars and fifty-six cents, of which the sum of five hundred dollars was paid in cash, and for the balance of said purchase price the said Bres and Richardson thereby assumed and agreed to pay nine promissory notes and interest thereon at the rate six per cent. per annum of six hundred dollars each, payable respectively in two, three, four, five, six, seven, eight, nine and ten years from the 28th of August, 1890, being nine of the ten notes given by the said Wooten as the purchase price of said land from said Weems, which notes are secured by mortgage and vendor's lien on said land, and said mortgage and vendor's lien were thereby kept in force and perpetuated until the full and final payment of said notes and interest.

The deed further recites that: "It is further agreed that the present purchaser shall have the same right (as that) given to said Wooten by the said Weems (of) calling in and paying any and all of said notes at their option, and at any time they may choose, on paying principal and interest accrued up to the time of such payment or redemption."

That act is one under private signature, and it bears the signatures of Wooten, as well as that of Bres and Richardson.

The parol testimony shows that this act of sale was executed immediately previous to the death of Weems, and that same was based upon the fact that Wooten had requested of Weems a ninety days' extension of the payment of his second note, and that the defendants had consented to purchase the property at the price stipulated if the extension was granted. That Weems granted the

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proposed extension shortly previous to his departure from New Orleans, and the defendants having been notified of that fact accepted the deed from Wooten, and had it recorded just before Weems' death. That immediately after his death Weems' attorney called to see Richardson in reference to the matter, and expressed regret that the sale had not been perfected, and Richardson informed him that it had been completed, and furnished him the deed, as confirmation of the fact.

Objection was made by defendants' counsel to the introduction of this testimony, on the ground that parol could not be offered to prove a state of facts at variance with the recitals of the act of sale. The judge *a quo* overruled the objection on the ground that this offer of testimony did not violate the rule of law invoked, because it was only intended to show that Weems was apprised of the assumption by the defendants, and had consented to extend the payment of the note, at the time past due, on the faith of it.

In thus ruling the judge committed no error. The obligations of the defendants to Wooten were incorporated in the act of sale, but Weems was not a party thereto and did not sign it. But being the holder of the notes and Wooten having applied for an extension of the one first falling due, Weems was interested to know his means of making payment when the extension should have expired; and what more likely than that he should have informed Weems of his intended sale to the defendants and of the terms of the same, and that Weems should have consented to the extension upon that ground.

The statement of Richardson was taken, also, without materially altering the force of the plaintiff's evidence on that question.

We are of opinion that the evidence discloses the existence of negotiations between Weems and Wooten, with respect to the extension of the payment of the second note, which went to its maturity on the 28th of August, 1892, and the payment of which the defendants assumed in the act of sale from Wooten on the 12th of January, 1893, four and one-half months after its maturity.

A witness for the plaintiff distinctly states that "when the second note came due (he thinks) there was an extension then. He (Wooten) concluded to sell out the island, and Richardson and Bres, who were friends of his, offered to buy the island if some short extension could be obtained on the note. Mr. Weems was willing, as

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these letters will show, which I offer, to grant this extension, and they made the purchase of the island and recorded the deed, assuming Wooten's obligation under the mortgage and these unpaid notes, and Wooten went to the country and took fever or something and died up there. Shortly after Weems died."

This statement makes it clear that Weems was still living when Wooten executed a title to the defendants, because Wooten's signature is appended to the deed, and he subsequently died prior to the death of Weems.

If an extension of the second note had not been already agreed upon between Wooten, maker, and Weems, payee, with the knowledge and concurrence of Bres and Richardson, it is unlikely that Richardson should have employed the phraseology that he used in the act of sale which he prepared for the parties to sign—that is to say, that the sale was made in consideration of the sum of six thousand seven hundred and ninety-nine dollars and fifty-six cents, of which five hundred and twenty-eight dollars and twenty-six cents was to be paid in cash, and the remainder to consist in the assumption of the payment of *nine* notes, one of which was then more than three months overdue.

Defendants' counsel cites us to the following authorities as governing this branch of the case, viz.: Pothier on Obligations, No. 57; Story on Contracts, Sec. 130; Gravier vs. Gravier, 3 N. S. 207; Tiernan vs. Martin, 2 Rob. 523; Mitchell vs. Cooley, 5 Rob. 240; Wiggin vs. Flower, 5 Rob. 406; Citizens Bank vs. Miller, 44 An. 199; R. C. C. 1890, 1902, 1779, 2201.

Those decisions proceed upon the same line and are to the effect that stipulations *pour autrui* to be of avail must be accepted by the beneficiary; but they go no farther nor say anything more than is expressed by the Code.

It declares that "a person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract or onerous donation; and if such third person *consents to avail himself* of the advantage stipulated in his favor the contract can not be revoked." R. C. C. 1890. (Our italics.)

In our opinion the evidence satisfactorily shows that Weems consented to avail himself of the stipulation made by the defendants and that same is binding on them.

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III

Complaint is made of the judgment having been rendered against the defendants *in solido*, whereas their contract is joint. This complaint is well founded and the judgment should be amended so as to make it only joint.

Complaint is also made of the judgment that it decrees plaintiff to have a right of pledge, whereas there is nothing in the contract to justify it.

This complaint is also just and well founded and the decree must be amended in this particular.

It is therefore ordered and decreed that the judgment appealed from be so amended that defendants be decreed jointly to pay the plaintiffs' demand instead of *in solido*, and so amended as to eliminate all recognition of the existence of plaintiffs' right of pledge.

It is further ordered and decreed that the judgment be in all other respects affirmed, and that plaintiffs be taxed with the cost of appeal.

ON APPLICATION FOR REHEARING.

WATKINS, J. This is a suit on two promissory notes of six hundred dollars each which bear date August 28, 1890, and went to their maturity on the 28th of August, 1893, and 1894, respectively; same being the third and fourth of the series of ten notes which William M. Wooten subscribed to represent the purchase price of a tract of land, and upon which the vendor retained a lien and mortgage to secure their payment.

The object of this suit is to recover a personal judgment against the two defendants *in solido* for the amount of the two notes, and the recognition of the vendor's lien and mortgage upon the land purchased by them.

The averment of the petition is, that on the 12th of January, 1893, the original vendee, Wooten, sold the mortgaged property to the defendants for a specified sum in cash, and their assumption in the act of sale of nine of said series of ten notes, as well as all of his obligations to his vendor, Alexander W. Weems; and that, since said sale and assumption, said defendants had paid the first one of the said nine notes, the payment of which they had assumed; that is, the one falling due on the 28th of August, 1891—an 1 have defaulted in the payment of the next two, which form the basis of the present action.

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The defendants tendered, in the lower court, an exception that the plaintiff had no power or authority conferred upon him by law to qualify or act as executor of the succession of Weems, and consequently, no capacity to institute this suit and stand in judgment; and same having been overruled their answer was that they incurred no *personal* responsibility or obligation for the payment of the notes to Weems, the vendor and payee, or to his executor, and for that reason can not be sued and held personally bound for same.

Or, in other words, that they may be proceeded against by hypothecary action, but not by ordinary process or personal action.

On the trial this contention was rejected and judgment was rendered against the defendants, and same was affirmed by the unanimous opinion of this court.

The propositions therefore which are presented for consideration on this application are: (1) Whether a judgment in this suit on the aforesaid notes would protect the defendants against further pursuit thereon by the creditors and heirs of Weems; (2) whether Weems, for whose benefit the assumption was made, had consented to avail himself of that advantage.

I.

On the exception, we cited a number of recent decisions of this court to the effect that the appointment of an executor can not be attacked collaterally; that it can only be done by a direct action; that whether legally or illegally made, the appointment of an executor must be treated as lawfully made, until same has been judicially examined and annulled; that unless the appointment of an executor or administrator is *absolutely void*, acts done under it in such capacity are legal and binding; and it is elementary that mere illegality in the appointment of a fiduciary or public officer will not vitiate acts done under it. This is the universally accepted theory of interpretation. If parties litigant could at any time, as matter of exception or defence, raise the question of the simple illegality or relative nullity of an administrator's appointment and traverse that issue by proof, the settlement of the successions would become practically interminable.

Certainly a litigant has no interest in that question, as he would be perfectly protected by the judgment pronounced.

On the contrary, he would have an interest in excepting to

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the appointment as being an absolute nullity. There is no question of that. That was precisely the theory entertained in *Grevenberg vs. Bradford*, 44 An. 400, to which counsel has referred us in his application for rehearing, and in which we quoted *Duson, Curator, vs. Dupré*, 32 An. 896, and *Simmons vs. Saul*, 138 United States, 441, which are based upon the same hypothesis.

This rule obtains in other jurisdictions as well as in our own, as will be seen from an instructive opinion by the Tennessee court, *Franklin vs. Franklin*, 18 S. W. Rep. 61, in which it was held that if a court appoint an administrator upon insufficient evidence of the residence of the deceased "the appointment may be voidable, but it is not void."

Counsel cites the case of *Moise, Tutor, vs. Life Association*, 45 An. 736. That case is not pertinent, because it involved the legal right of a maternal uncle of certain minors residing in the city of New Orleans to receive appointment by the Civil District Court as tutor for them and institute suit upon a policy of insurance against the defendant; and the court held that the appointee was without capacity to receive appointment or to stand in judgment for the minors. But the court, while thus holding, did not put its opinion upon the ground taken by the defendants' counsel in this case, as will appear from the following extract therefrom, viz.:

"We have no concern with the propriety of or validity of plaintiff's appointment as tutor of the minors, nor with his right and power in that capacity to take possession of and administer the estate of their deceased parent, whose heirs they are, in this State."

"Guyol was domiciled and died in Kentucky, and so far as appears he left no property, real or personal, in this State. This policy of insurance is a mere non-negotiable evidence of a debt due by a New York debtor to a Kentucky creditor. The appointment by the insurance company of an agent in this State, through whom it may be sued, does not change the domicile of the company. Under no possible view can such a debt be said to have a *situs*, real or fictitious, in this State."

Applying to this, the principle announced in that case, the plaintiff had an undoubted right to take possession of the notes of Wooten, as the property of Weems, deceased, because they had been deposited in a bank of this city by Weems, for his personal account during his lifetime, and they there remained until delivered to the plaintiff as his executor.

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The ten notes aggregated six thousand dollars in capital alone; and it is not pretended that he owned anything else of value at the time of his death. It is not claimed that Weems had at his death either heir or creditors.

The law declares that the place of the opening of a succession is fixed as follows, viz. :

1. "In the parish where the deceased resided, if he had a fixed domicile or residence in this State.

2. "In the parish where the deceased owned immovable property, if he had neither domicile nor residence in this State, or in the parish in which it appears by the inventory his principal effects are, if he have his effects in different parishes.

3. "In the parish in which the deceased died, if he had no fixed residence, nor any immovable effects within this State at the time of his death." Revised Civil Code, p. 935.

An examination of the evidence plainly shows, that Alexander Weems had, at the time of his death, "no fixed domicile or residence in this State." That he owned no immovable property in this State; and that the parish of Orleans is shown by the inventory, as well as by the parol proof, to have been the place where the notes given for his immovable property were situated, and which constituted "his principal effects."

It further shows that he did not die in this State, though he had made the city of New Orleans his abiding place previous to his departure from the State, and subsequent death.

On this showing with regard to the law, as well as to the evidence, it certainly can not be affirmed that the plaintiff's appointment was an absolute nullity; for the law provides that "no testament can have effect unless it has been presented to the judge of the parish in which the succession is opened," etc. R. C. C. 1644.

II.

On the second proposition the contention of the defendant's counsel seems to be directed at the impossibility of Weems having accepted the stipulations of a deed which he never saw after same was executed; while, on the contrary, the opinion deals with Weems' previous knowledge of the transactions which led up to the sale, with the terms of which he was fully acquainted; and more particularly with the three months' extension of Wooten's second

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note, then overdue, upon the faith of which the transaction was based.

In counsel's brief it is admitted that Weems left Louisiana in May or June, 1892; and died on the 18th of March, 1893—never having returned to this State in the meanwhile.

It is further admitted—and the deed itself shows the correctness of the statement—that the act was executed and recorded on the 12th of January, 1893, two months *prior to the death of Weems*.

It is further admitted that Wooten died on the 30th of January, 1893, and the deed shows that he signed the same on the 12th of January previous.

It is shown by the record that prior to his departure from the State Weems executed a power of attorney in favor of Mr. J. C. Gilmore, authorizing him to attend to his business during his absence, and directing the cashier of the Hibernia National Bank to surrender to him the notes of Wooten then in the bank "should the first one, falling due August, 1892, not be paid at maturity."

Mr. Gilmore states as a witness that at its maturity, on the 21st of August, 1891, Wooten requested of Weems an extension of his *first* note, and that same was granted, and the note was subsequently paid. He says that when the second note fell due he again applied for an extension. That "he (Wooten) concluded to sell out the island, and Bres and Richardson, who were friends of his, offered to buy the island, if some short extension could be obtained on the note. Mr. Weems was willing, as these letters (exhibiting them) which I offer will show, to grant an extension, and they made the purchase from Mr. Wooten of the island and recorded the deed, assuming Wooten's obligations under the mortgage and these unpaid notes," etc.

The correspondence in the record shows that on the 28th of November, 1892, Weems wrote a letter to Gilmore, stating that he had received a letter from Wooten requesting a ninety-day extension on his *second* note, then past due, and that he had replied requesting him to call on Gilmore, "as he had charge of his interest" in Louisiana.

That on the 16th of December, 1892, Wooten wrote to Weems stating that he was temporarily embarrassed and unable to meet the payment of his note then past due, but that he "had found a purchaser in Mr. J. G. Richardson and J. R. Bres, New Orleans, provided he (Weems) will extend the time of the payment of the note now past due by (him) ninety days from the 1st of December, 1892."

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He further states that he therewith enclosed an obligation from them to that effect; and he requests him (Weems) to send same back to "his attorney, Mr. Gilmore," stating that they (Richards-on and Bres) "will satisfy him as to his (Weems) interest in the matter," and that they will assume payment of all notes held by (Gilmore) against the property."

The enclosure is of the following tenor, viz.:

" December 16, 1892.

" W. L. Wooten, Esq., New Orleans, La.:

" DEAR SIR—We will take your half of the Shell Island or Weems' island at the price offered, provided you secure the extension from Mr. Weems of the note now past due for the term of ninety days from December 1, 1892.

(Signed)

" JAS. G. RICHARDSON.

" JOS. R. BRES."

Replying to the foregoing under date December 20, 1892, he (Weems) wrote to Mr. Gilmore as follows, viz.:

" Yesterday afternoon I received the enclosed communication from Mr. Wooten; it will speak for itself. I addressed a letter to Mr. Wooten on the same day I last wrote you, requesting that he give me a full statement as to his expectations and ability to meet his note then due and the within is his reply. I will reply by the same mail as this, *that I have placed the entire matter in your hands and will be satisfied with any agreement entered into by you as my attorney and counsel*. I shall have no objection to granting a further extension on the note if it does not lessen my security in the future * * * I leave the matter with you," etc. (Our italics.)

Mr. Gilmore further states that "acting under the instructions of Mr. Weems" he called upon Mr. Richardson *just after the death of Mr. Wooten*, which took place on the 30th of January, 1893, in response to a call which Mr. Richardson had previously made upon him, referring to an envelope that had been left on his table during his absence.

Being asked the date of this interview he said: "I could not fix the date, *but it was in the course of the negotiations.*"

"An extension had been granted on the second note by Mr. Weems, and Richardson and Bres had signed these papers."

In speaking of the second extension on the condition that they

(Bres and Richardson) would assume the payment of the series, he says:

"Hearing from Mr. Weems that he was willing, I called upon Mr. Richardson and said that the extension is granted; but, I said to him, I see that Mr. Wooten is dead, by the papers. I then said, now he could pass no transfer; and he said, 'Oh, yes; we have passed a transfer before he went to the country, and it has been sent over and recorded.'"

Mr. Gilmore then said: "*Weems was satisfied with the condition, and seeing that Wooten was dead he was better satisfied than ever.* * * The conditions of the letter of Richardson and Bres that this extension would be allowed was granted, and Richardson said that they had executed the deed before he (Wooten) left the city."

On being interrogated as a witness, Mr. J. G. Richardson supplemented the statement of Mr. Gilmore, and filled a gap in the testimony which he had left open, as will appear from following, viz.:

Q. "I wish you to state that conversation between Mr. Gilmore, as agent for Mr. Weems, and yourself and Mr. Bres, in regard to matters that you have heard Mr. Gilmore testify to."

A. "Mr. Gilmore called at the office in answer to that letter that is there from Mr. Weems, giving an extension of time of ninety days on that note then past due; and he called, and Mr. Wooten was present, and he stated that it was all right—the extension," etc. * *

Q. "Was anything said by Mr. Gilmore to you when reference was made to the making of this sale by Wooten to yourself, with regard to having a notarial act passed?"

A. "Yes; when he first called he said that whenever we got ready to come over to his office that there was a notary there, and we could prepare the deed, which I did not do. When we got ready to make the deed I wrote it myself."

Intermediately, between the conversation which was related by Mr. Richardson and that related by Mr. Gilmore, the deed was executed by Wooten and accepted by Richardson and Bres, and Wooten had died; but Weems was still alive, and Gilmore was his duly authorized and acting agent.

Richardson and Bres entered into possession of the property, and, subsequently, when the ninety days' extension had expired, Mr. Richardson went to the bank and saw the date it would expire and on that day he paid the note.

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The foregoing testimony was not quoted in our original opinion *in extenso*, but its substance only was stated. It furnishes full and complete proof that Wooten obtained a ninety days' extension of his second note, at the time past due, on the express condition that Richardson and Bres should purchase the mortgaged property and assume the payment of Wooten's nine notes—the one extended amongst the number. That Richardson and Bres executed an obligation to that effect, and it was forwarded to Weems, on the faith of which he granted the extension. That notice of this extension was subsequently given to Richardson and Bres, in the presence of Wooten, by Mr. Gilmore, as the agent of Weems. That immediately after that interview Richardson prepared the deed and it was signed by himself, Bres and Wooten and recorded. That subsequently it was discussed by Richardson and Gilmore; and when the extension had expired the former paid the extended note. The personal liability of the defendants is clearly established beyond the peradventure of a doubt; for Mr. Weems was living at the time of these transactions and Mr. Gilmore was both his agent and attorney.

Not only does the proof show Weems' previous knowledge of the transactions which led up to the assumption of Bres and Richardson, but his possession of the written obligation to that effect. It shows that not only did Weems specifically agree to grant the extension to Wooten upon the faith of Richardson and Bres' personal obligation, but due notification of Weems' acceptance of their proposal was given by Weems to Wooten in writing, and to his agent, Gilmore; and same was personally communicated by Mr. Gilmore to Bres and Richardson in the presence of Wooten.

It shows that with full knowledge of these facts, and with direct reference to them, Mr. Richardson wrote the act of sale, which Wooten signed and he and Bres accepted; and that his action, in this respect, was subsequently approved by Mr. Gilmore, as agent, during an interview between Gilmore and Richardson.

All these transactions occurred during the lifetime of Weems; and subsequently Richardson paid the extended note.

But there is another view of this case that is perfectly conclusive, as to the right of the plaintiff to recover, and it is that the proof disclosing that the defendants had accepted Wooten's proposition, and had actually purchased the mortgaged property and assumed the payment of his notes, it was within the power and competency of either

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Weems personally or of his agent, attorney or executor to accept said assumption and enforce the same, so long as same remained unrevoked, or not annulled by the defendants—conceding for the argument that the proof is not complete of his previous acceptance of the stipulation *pour autrui* defendants had made in his favor. And such subsequent acceptance is fully evidenced by this suit.

Our conclusion is that, in any view that can be taken of this case, the judgment should remain undisturbed.

Rehearing refused.

No. 12,079.

NEW ORLEANS & WESTERN RAILROAD COMPANY VS. BARTHOLOMEW MORERE.

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108	8
48	1273
116	164

When the plaintiff in an expropriation suit avails itself of the permission of the statute and deposits the amount of the verdict in the hands of the sheriff, subject to the owner's order, it becomes entitled at once to the right, title and estate of the owner in and to the land described, in the same manner as a voluntary conveyance could do; and in this manner it can deprive an appeal by it prosecuted of a suspensive effect. And in the event of any alteration being made in the judgment on appeal the plaintiff is bound only to pay the increased allowance, or it will be entitled to recover back the surplus paid, as the case may be.

More than usual credit is attributable to the verdict of a jury in an expropriation suit, and it will not be set aside unless manifestly erroneous.

A PPEAL from the Twenty-first Judicial District Court for the Parish of Jefferson. *Rost, J.*

Farrar, Jonas & Kruttschnitt for Plaintiff, Appellant.

G. V. Soniat for Defendant, Appellee.

Argued and submitted April 7, 1896.

Opinion handed down April 20, 1896.

Rehearing refused June 25, 1896.

The opinion of the court was delivered by

WATKINS, J. This is an appropriation proceeding and for the purposes of convenience and accuracy of statement we have made the following extract from plaintiff's brief, viz.:

Railroad Co. vs. Morere.

"STATEMENT OF CASE.

"This is an expropriation proceeding. The plaintiff railroad company was organized January 17, 1895, by act before H. T. Gurley, notary public, for the purpose of constructing a 'railroad with all proper turnouts, side tracks, switches and spurs, from some point on the Mississippi river in the parish of Orleans, or St. Bernard as the Board of Directors might elect, through the parishes of Orleans and Jefferson to some point on the east bank of the Mississippi river in the parishes of Jefferson, St. Charles or St. John the Baptist, most convenient for crossing said river; thence to the western boundary of the State by the most direct, convenient and approved route to be selected by the Board of Directors, there to connect with a line of road to be constructed in the State of Texas direct to Dallas in said State.' The object of this action is to expropriate a right of way through defendant's property for a short line switch or connection with Southport, which in the joint terminal of the Yazoo & Mississippi Valley Railroad Companies in the parish of Jefferson, about one mile from plaintiff's main line.

"The petition avers plaintiff's incorporation and exhibits its charter; that its line is under construction and exhibits a map showing its location and construction on the east bank of the Mississippi river; that at what is known as Southport, on the Mississippi river, immediately above the parish of Orleans and in the parish of Jefferson, is situated the terminus of the Yazoo & Mississippi Valley Railroad Company, which is also used as a terminus by the Illinois Central Railroad Company, and that the necessities of commerce and your petitioner's business require that your petitioner should have a short-line switch or connection from its main line to the tracks of the Yazoo & Mississippi Valley Railroad Company, so as to make immediate connection with Southport, and that this switch is laid off upon the map marked Exhibit B and indicated by the blue line thereon; that said switch leaves the main line of your petitioner's road in the property belonging to the estate of Peters, thence through the property belonging to the Yazoo & Mississippi Valley Railroad Company, and thence through a small piece of land containing about one and one-tenth acres belonging to Bartholomew Morere, who resides in the parish of Jefferson, as will more particularly appear by plat annexed. The petitioner then describes the land minutely and the right of way, 100 feet wide, through it. It

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avers that it is a low, marshy piece of swamp, containing about one and one-tenth acres, lying between two parallel lines of railroad, the Illinois Central and the Yazoo & Mississippi Valley Railroad, without improvements or fences, which has never been cultivated and is entirely unfit for cultivation, and has never been utilized by said Morere or his vendors for more than thirty years. The right of way asked for is averred to contain 0.550 of an acre and to be worth about fifty dollars; that in order to avoid litigation plaintiff had tendered defendant two hundred and fifty dollars, which he refused, and that defendant demanded the outrageous and exorbitant sum of four thousand five hundred dollars.

"Being unable to agree with defendant, plaintiff prayed for the condemnation of the land by a special jury of freeholders and for the notification of defendant according to law. Proper order was granted on this petition, the special jury was summoned, and the defendant was served with a copy of the petition and order, and notified, as the law directs, that the special jury to assess the value of the land and damages would be empaneled on January 15, 1895, at 11 o'clock, at the court house in Gretna."

The defendant first plead a variety of exceptions which were overruled, followed by a motion to quash the *venire*, which was denied, and then he tendered an answer pleading specially that plaintiff did not need his land because it could easily connect at other points with the roads mentioned; and that it was not needed for the lawful purposes of the plaintiff nor for a general use, or a public purpose. And finally he averred that in the event the land should be expropriated, the land was worth four thousand five hundred dollars, on account of the interference the proposed railroad would cause to his drainage, and other inconveniences.

On the trial there was a verdict of the jury and a judgment condemning the land to the uses of the plaintiff, and fixing the value of same at eight hundred dollars; and it decreed that the plaintiff shall not have the right to enter upon or take possession of said land, until it shall have paid the aforesaid sum to the defendant; and that in case of an appeal from said judgment by the plaintiff, it shall deposit said sum in the hands of the sheriff, subject to the order of the defendant.

It was necessary that this statement should be made, in order to gain a clear idea of the appellee's motion to dismiss plaintiffs' appeal, which is grounded on the following objections, viz.:

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1. That plaintiff voluntarily acquiesced in the judgment, in that it did not apply for a new trial, and deposited the amount of the judgment, and demanded and obtained a conveyance and possession of defendant's land by an order of court on the 18th of January, prior to the finality of same on the 31st of said month; and that by this means it virtually debarred him from asking for a new trial, or of obtaining any other redress whatever.

2. That the appeal has lapsed, because the transcript of appeal was not filed in this court in time.

3. That the appeal was not demanded by the appellant, and made returnable according to law, in that it should have been made returnable within fifteen days after judgment, whereas it was made returnable more than thirty days after the verdict and judgment through the fault of the appellant.

To the first objection it is sufficient answer to say that the defendant tendered in the lower court no motion for a new trial, and has not answered the appeal of the plaintiff and requested any amendment of the judgment by this court; and it is thus made evident that he has suffered no injury on account of the prematurity of the petition for an order of appeal.

The other two grounds may be taken together.

The section of the Revised Statutes (R. S., Sec. 709) on which the defendant relies for making an appeal in expropriation cases, returnable "within fifteen days," is not applicable to this case—it being governed by the provisions of Sec. 702.

The section defendant relies upon has exclusive reference to injunction suits restraining proceedings for the expropriation of land, which are referred to in the preceding section. R. S., Sec. 708.

The order of appeal makes the appeal returnable on the 17th of April, 1896, and the transcript was filed on the 20th of that month. It was in time.

The motion to dismiss is denied.

Under the law there is, in our opinion, nothing remaining for our consideration but a question of fact relative to the value of the land; for it provides that no appeal in such case shall suspend the execution of the judgment, "but the payment of the amount of the verdict by the company to the owner, or the deposit thereof, subject to the owner's order, in the hands of the sheriff, shall entitle the corporation to the right, title and estate of the owner in and to the land de-

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scribed in the petition in the same manner as a voluntary conveyance would do.

"But in the event of any change being made by the final decree in the decision of the cause the corporation shall be bound to pay the additional assessment or be entitled to recover back the surplus paid, as the case may be." R. S., Sec. 702.

Notwithstanding counsel for the plaintiff has characterized the testimony of the defendant in the most unauthorized and remarkable manner, as that of a "would-be blackmailer of this corporation" (brief, p. 9), we are disposed to give full effect to the testimony upon which the jury of freeholders founded their verdict for the sum of eight hundred dollars, as the value of the property. They were selected from the vicinage of the property, and were acquainted with its location and advantages; and more than usual credit is attributable to their verdict. Jurors in such cases are, in a limited sense, experts, and the verdicts they render will not be altered, except when manifestly erroneous. *New Orleans & Fort Jackson Railroad Co. vs. McNealy*, 47 An. 1298; *New Orleans & Fort Jackson Railroad Co. vs. Rabasse*, 44 An. 178; *Telegraph Cable Co. vs. Railroad Co.*, 43 An. 525; *Railroad Co. vs. Dillard*, 35 An. 1045.

Judgment affirmed.

No. 12,156.

A. LEHMAN & CO. VS. ROMANTA T. HART.

GOODBIER ET ALS., INTERVENORS.

The intervenor in a suit in which the plaintiff claims less than two thousand dollars, the intervenor's demand also being under our appellate jurisdiction, has no appeal to this court.

A PPEAL from the Fourteenth Judicial District Court for the Parish of Iberville. *Talbot, J.*

Hebert & Hebert for Collet, *Louis Lozano* for *Lehman & Gogreve*, Plaintiffs, Appellees.

Edward N. Pugh and *Paul Leche* for Intervenor, Appellants.

Submitted on briefs May 23, 1896.

Opinion handed down June 22, 1896.

State vs. Tibbs et al.

The opinion of the court was delivered by

MILLER, J. This is an appeal from the judgment dismissing the intervention of the appellants attacking the judgment and attachments of alleged creditors of the defendant.

The petition of intervention referred to these suits alleged the plaintiffs were precluded from instituting their proceedings by reason of an alleged respite they had granted the debtor; alleged also collusion with him to give their creditors a fraudulent preference, prayed that the respite be set aside and that he be ordered to make a surrender of his property. The court sustained the exceptions of the plaintiffs, and we think it well to say, if we could take cognizance of the appeal the grounds of relief seem to be covered by our judgment in a previous phase of this controversy, in which intervenors occupied the same relation to the debtor and his creditors as that of the intervenors in this case, and who relied for relief on the same allegations we find in the petition of intervention in this case. 48 An. 660; *State ex rel. Marchand vs. Judge*.

But we have a motion to dismiss the appeal. The suits against the debtor Hart were not consolidated. The appeal was taken from the judgment in a suit in which the plaintiff claimed an amount be-

low that required for an appeal to this court. The claims of each of the intervenors joined in the petition as well as the aggregate amount of their claims is less than two thousand dollars. In our view the motion to dismiss must be maintained. We have no brief from the appellants on the motion to dismiss and find no ground to sustain it.

It is therefore ordered that this appeal be dismissed,

No. 12,103.

STATE OF LOUISIANA VS. UPSEY TIBBS ET AL.

A refusal to allow a peremptory challenge will not avail a defendant when it is not claimed that in consequence of the judge's ruling defendant had been compelled to accept an obnoxious juror. 38 An. 490.

An exception to the charge of the judge, that it was calculated to injure the party accused, is entirely too general and sweeping.

The judge properly refused to charge the jury on abstract questions of law.

State vs. Tibbs et al.

A PPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

M. J. Cunningham, Attorney General, *R. F. Broussard*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

Todd & Todd for Defendants, Appellants.

Argued and submitted May 28, 1896.

Opinion handed down June 1, 1896.

Rehearing refused June 30, 1896.

The opinion of the court was delivered by

NICHOLLS, C. J. Upsey Tibbs, Ike King and Almond Wilkerson were indicted for robbery, tried, found guilty and sentenced to three years' imprisonment in the penitentiary.

They have appealed, relying upon three bills of exception.

In the first bill it is stated that on the trial of the case, while the petit jury was being empanelled, the sheriff drew from the box a slip of paper with the name of A. G. Bernard upon it; that on calling this name and no one answering to it, it was found that one A. G. Barrow was in the court house and had been regularly selected by the jury commissioners, and being summoned on the *venire* for the week previous to the trial, A. G. Barrow answered to his name when the *venire* was called in court. That thereupon the judge presiding allowed A. G. Barrow to be sworn on his *voir dire* as competent to serve, contrary to the objections of defendant, and, that subsequently, Upsey Tibbs had to peremptorily challenge said A. G. Barrow; that said Tibbs subsequently exhausted his peremptory challenges before the completion of the jury; that to said ruling admitting the said Barrow to be so called and sworn on his *voir dire*, defendants excepted and tendered their bill of exceptions to be signed.

The second bill states that on the trial defendants had offered two witnesses who had testified to their good character in the community, whereupon the judge charged the jury as follows on the point of character: "Evidence of the character, that is to say of the reputa-

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tion, the accused has in the community is always competent, and it often occurs that it proves to be a great benefit to him. It tends, under many important phases of a case, to create a doubt which but for such evidence would not have existed in favor of the party charged with crime. Evidence of character should therefore be looked upon by the jury as part and parcel of the whole evidence submitted to their consideration. But however satisfactory or precise it may be it must not be allowed to destroy the tangible effect of direct evidence, or of the uncontradicted statement of witnesses, and still less must it outweigh in the scale of justice and do away with, or annul, any conclusive evidence of actual guilt. Evidence of character is entitled to the serious and honest consideration of the jury, not less but not more than any other legal evidence adduced on the trial. It is from that evidence, as well as from all other before them, that the jury are expected to form their final conclusions." That defendants excepted to said charge, as it was calculated to do them injury, and they reserved a bill.

The third bill states that on trial of this cause, in which an affray between negroes and Italians was shown, and after the District Attorney in addressing the jury on the case spoke of the disturbance of what might be termed (since six persons were engaged in the transaction) as a riot, the following charge was asked by the defendants:

"If several persons engage in a riot and an offence is committed by one of them, which offence is not in pursuance of the common object of the rioters, and foreign to the same, that each of the persons engaging in said riot should not by reason of their presence there be held guilty of such offence;" which charge was refused as not applicable to the facts of this case, because accused were charged with robbery, and not with creating a riot and disturbance. To which ruling defendants excepted and tendered their bill for signature.

In defendants' brief, referring to the first bill of exceptions, it is said: "This bill presents the question as to whether any one whose name is not served on the accused before trial can be forced upon the accused as a juror. The list of jurors served on the accused contained a name—A. G. Bernard. When the jury was empaneled A. G. Bernard was called, and, as the bill recites, no one answered to the name. There was one A. G. Barrow in the court house, and he was instructed to come forward as a juror. He was objected to, on

the ground that there was no authority for calling him as a juror. The defendant Tibbs was finally compelled to challenge this juror peremptorily. Tibbs subsequently exhausted his peremptory challenges. We submit that the ruling allowing Barrow as a juror, and causing Tibbs the necessity of challenging him peremptorily, was without authority of law, and unfair to the accused. 'The names of the jurors,' says the law, 'must be drawn from the box.' In this case it was not done."

The bill is obscurely drawn. It is difficult to know from it the grounds of defendant's complaint. They say that when Barrow was presented as a juror, Tibbs objected that "there was no authority for calling him," but they do not inform us either of the actual circumstances under which Barrow was drawn as a juror or the particular facts upon which they based their idea that there was no authority to call him as such, or of the grounds on which the State tendered him. We infer that it was claimed that the name "A. G. Bernard" on the jury list served upon the accused was a clerical error; that the real name upon it should have been "A. G. Barrow" (that of the juror tendered), and that the variance in the name was held immaterial by the court, but we can not deal with bills of exceptions by reaching objections by inference. Assuming, however, as correct that the court should have at once ordered Barrow to stand aside and have not compelled Tibbs to peremptorily challenge him, we find no resulting injury, for it is not claimed that "in consequence of the judge's ruling defendants had been compelled to accept an obnoxious juror." *State vs. Creech*, 38 An. 480. Counsel of defendants complain greatly of that sentence of the judge's charge in regard to the weight to be given to testimony as to the character of persons accused of crime, in which he stated that evidence of good character, however satisfactory or precise, should not be allowed to destroy the tangible effect of direct evidence, or of the uncontradicted statement of witnesses. He says the effect of such instruction was to convey the idea to the jury that they were forced to accept as true uncontradicted statements of witnesses or, at all events, to give to such statements when weighed in the balance as against uncontradicted testimony of good character a controlling force.

It is true that uncontradicted statements of witnesses may be conceived of a character such as might justify a juror to disregard them

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or to give them little force, and that, therefore, this particular statement given to the jury might have been more guardedly stated for some special case, but we scarcely think that taking the instructions as a whole, the jury was misled. The jury was clearly told that evidence of character was entitled to the serious and honest consideration of the jury—not less, but not more than any other legal evidence adduced on the trial. That it was from that evidence and all other before them that the jury are expected to form their final conclusions. “That proof of good character did not *per se* ‘destroy’ the other evidence in the case.” It is fair to assume that the instruction inserted in the bill was only part of the general charge, and that the jury was fully informed as to their power of full control in passing upon the credibility of witnesses and weight and force of all evidence before them, and construed the judge’s statement as he intended it should be construed, as being made subject to their plenary power of discriminating and weighing evidence. But if counsel thought the instruction was one liable to be misconstrued, they should have called the court’s attention to what they conceived or claimed to have been wrong, and asked for a correction, or for a modification, and not contented themselves with simply excepting that the charge was “calculated to do their clients an injury.” It is almost impossible for a judge on the trial of a case to gauge every word he uses, and it is not only justice to him, but it is, we think, a reasonable requirement at the hands of counsel in aid of the proper administration of justice that they should not hold in reserve as objections, to be used after conviction, and on appeal, matters within their power of correction at the time of their happening. An exception to a charge that it was calculated to injure the party accused is entirely too general and sweeping to be held as an attempted correction made at the time.

We are of the opinion that the District Court correctly refused to give the special charge, the refusal to give which is made the subject of complaint in the third bill. The matter, as it appears in the record, was simply a request of the District Judge to charge the jury upon an abstract proposition of law. There is no statement in the bill from which it would appear that there was anything in the testimony in the case or of the facts of the case with which this requested charge had any legal connection or to which it could be legally made applicable. We have no reason to

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suppose that either one or all of the defendants were present at a riot between negroes and Italians, and that their mere presence at the same had been made the basis for their prosecution for a robbery which occurred during the riot, or that their conviction rests upon such a condition of evidence or fact. Defendants did not ask the court to charge the jury that if they found such and such facts established by the evidence (which facts we will assume would, if established, make the requested charge a pertinent or relevant one) that then the charge asked would be the law governing the case, but took up an extract from some decision or author in which certain facts were assumed and the law as resulting from that state of facts announced and sought to have the announcement so made declared a correct exposition of law. The court was fully justified in refusing to give the charge if it had no legal bearing on the case, particularly in the form it was asked. The court declares that it had no bearing on the case, and defendants have neither made nor attempted to make a showing to the contrary. Finding no grounds upon which a setting aside of the verdict of the jury and an avoidance of the judgment based thereon could be asked, it is ordered that the judgment appealed from be affirmed.

No. 12,107.

STATE OF LOUISIANA VS. J. G. CALKINS.

The Supreme Court will not consider bills of exception unless signed by the judge before whom the case was tried.

When counsel for defendant present bills of exception to the judge for his signature and the judge refuses, it is the duty of counsel to except to such refusal. Unless this is done, this court will decline to review the action of the judge in refusing his signature.

A PPEAL from the Criminal District Court for the Parish of Orleans. *Moise, J.*

M. J. Cunningham, Attorney General, *Charles A. Butler*, District Attorney, and *John J. Finney*, Assistant District Attorney, for Plaintiff, Appellee.

M. Marks for Defendant, Appellant.

State vs. Calkins.

Argued and submitted April 25, 1896.

Opinion handed down May 4, 1896.

Rehearing refused June 29, 1896.

The opinion of the court was delivered by

NICHOLLS, C. J. Defendant appeals from the sentence of the District Court (based upon the verdict of the jury) to suffer imprisonment at hard labor in the penitentiary for the term of eight months. It appears from the note of evidence found in the record that during the trial objections were made by the accused to questions propounded to different witnesses, which were overruled; that upon cross-examination of certain witnesses questions propounded by the defendant were not permitted to be asked by reason of objections urged by the State, and that to these rulings defendant "excepted and reserved the right to file a bill of exceptions;" also, that the defendant having gone on the stand as witness in his own behalf, the State, during cross-examination, propounded questions to him and proposed to offer in evidence certain letters; that defendant objected; whereupon the court ruled three of said letters admissible; that to this ruling counsel for defendant "excepted, and with consent reserved the right to file a bill of exceptions;" and that the letters were read to the jury.

We find copies of these letters in the transcript; also the testimony of several witnesses taken on the trial.

Defendant, having been found guilty, moved for a new trial on the grounds stated. This motion was formally abandoned and his counsel asked that sentence be pronounced. He was accordingly sentenced on the 5th of March, 1896. On the 10th of March defendant moved for an appeal, and at the same time offered and filed for the signature of the judge three papers purporting to be bills of exception reserved during the trial. The court refused to sign the bills, assigning the following as its reasons:

"Rule XV of the Criminal District Court, adopted January 2, 1894, as shown by the minutes of that date, provides: 'All bills of exception must be presented to this court for signature before the filing of a motion for a new trial or before sentence.' The rules of the court are printed in large type and placed at the bar of the court in a conspicuous place, conveniently subject to the inspection

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of all attorneys practising in this court, and there is no reason why any lawyer should plead ignorance of them. The verdict was rendered January 20, 1896; a motion for a new trial was filed January 27, 1896, and on February 4 following was abandoned, and counsel for defendant asking for sentence and pleading for leniency on behalf of his client. The matter was taken under advisement and the prisoner sentenced March 5, 1896. There was, therefore, ample time to prepare bills and submit them to the court for its signature, and no excuse for any negligence in the matter." The court ordered the appeal. No exception was taken to this action of the court. We find copied in the record, but unsigned, the bills thus tendered for signature. Matters come before us in that shape. Counsel for defendant urges upon us that his failure to tender the bills sooner than he did was because of the failure of the stenographer to file in court the testimony which had been taken. He says the delay can not be laid at his door. We do not see the necessity of having had such testimony filed in order to frame the bills. Counsel must have known substantially what it was and he could have recited it in his bills. He knew precisely his grounds of objection and those of the State, also the reasons assigned by the court for its rulings. If counsel had desired, for greater certainty, to annex to the bills the copy of the testimony taken, he could have stated in the bill that it would have been so annexed (when filed) as part of the bill. The court would, doubtless, have consented that this should be done had counsel asked such consent. The testimony, when filed, could by proper verification, with consent of the court, have been identified with the bill. Counsel not only did nothing of the kind, but he did not except to the judge's refusal, and no attempt has been made by *mandamus* to test the propriety of his action. We have, on this appeal, to take the record as we find it. So taking it there are no bills of exception before us and nothing upon which we can predicate error.

The judgment must be and it is hereby affirmed.

Corso & Co. vs. Railroad Co.

No. 12,049.

AUGUSTINO CORSO & Co. VS. NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY.

It would be an extreme case which would justify a refusal by a consignee to receive freight when notified.

It is the duty of the consignee to receive the consignment and test the liability of the carrier for damages, if any had been sustained.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Farrar, Leake & Lemle for Plaintiffs, Appellants.

Harry H. Hall for Defendants, Appellees.

Denègre, Blair & Denègre for Baltimore & Ohio Railroad Company and Baltimore, Ohio & Southwestern Railroad Company, Defendants, Appellees.

Argued and submitted March 25, 1896.

Opinion handed down June 15, 1896.

Rehearing refused June 25, 1896.

Action is brought against the Northeastern Railroad Company, the Alabama Great Southern Railroad Company, the Cincinnati, New Orleans & Pacific Railway, the Baltimore & Ohio Railroad Company, and the Baltimore, Ohio & Southwestern Railroad Company for the sum of five thousand two hundred and forty-two dollars and sixty cents, with legal interest.

Plaintiff's claim is based upon two shipments of fruit from New Orleans to Pittsburg—one made on May 30, 1892, the other on June 27, 1892, under bills of lading identical in the two cases. In respect to the shipment of 30th of May, 1892, plaintiffs say, that on that day they shipped from New Orleans by the New Orleans & Northeastern Railroad Company, a carrier by railway, on New Orleans & Northeastern's fruit car No. 15,159 (said car being built specially for the transportation of fruit), with proper ventilators and gratings, two hundred and ninety-seven boxes of choice lemons and sixty-eight boxes of choice oranges

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(three hundred and sixty-five boxes in all), consigned to Augustino Corso, of Pittsburg, at the through rate made by said carrier, with its connecting lines to destination, of fifty cents per hundred-weight; that the said Northeastern Railroad Company, in and by its undertaking in the receipt of said shipment of oranges and lemons, then and there agreed and promised for itself and for each of its connecting lines of railway to properly carry forward, transport and deliver in fruit cars to the consignee at destination, the said shipment of oranges and lemons, in good order, with reasonable care commensurate with the value and perishable nature of said shipment at the rate of freight charged thereon, but that in violation of their undertaking, and owing to the fault, negligence and misconduct of each of said carriers, the said shipment of oranges and lemons reached Pittsburg on or about June 5, 1892, and was sold by the Baltimore & Ohio Railroad Company, the same being so badly damaged and decayed that the consignee refused to receive the same; that it was at the time the said shipment was made and it still is the legal duty and uniform custom of all common carriers by railway, and particularly the New Orleans & Northeastern Railroad Company, and each of said railroad companies, made defendants in the case, connecting carriers, forming together a through line from New Orleans to Pittsburg, to ship fruit in regular fruit cars, with ventilators and gratings, and to carry through, from point of shipment to destination, all shipments of perishable fruits in the same car or cars in which the same was loaded, in order to avoid the handling of the same, and that plaintiffs, when said shipment was made, were led to believe from the custom prevailing among common carriers, and of the defendant companies in this suit, and from the representations of the agent of said New Orleans & Northeastern Railroad Company, that the said fruit car No. 15,159 with ventilators and gratings, loaded with their fruit, would go through to destination; but that owing to the carelessness and negligence of each of said defendant companies, and in violation of their duty to petitioners, said fruit while in transit was, at some point unknown to plaintiffs between New Orleans and Pittsburg, carelessly and roughly transferred from said fruit car to an ordinary box car, and reached Pittsburg in a broken, damaged and decayed condition, as before stated; that the transfer from said fruit car with ventilators and gratings into said closed box car caused the said fruit to become mature and over-

ripe, and to decay and become worthless, and that by the carelessness and rough handling of said oranges and lemons from said fruit car into the box car the boxes in which said fruit was packed were broken and smashed, and the contents thereof scattered, mashed, damaged and decayed as aforesaid, the same having become a total loss.

The allegations in reference to the second shipment on June 27, 1892, are, that on that day they shipped by the Northeastern Railroad Company from New Orleans to Pittsburg, in Alabama Great Southern fruit cars Nos. 9490 and 9224 (said fruit cars being specially built for the transportation of fruit with ventilators and gratings), seven hundred and fifty boxes of choice lemons and seventy-one half boxes of choice oranges consigned to Augustino Corso at Pittsburg; that in violation of their undertaking (which was set forth in the same terms as in regard to the first shipment), and owing to the fault, negligence and misconduct of the defendant companies, the said shipment of oranges and lemons was delivered in Pittsburg on or about July 14, 1892, in such a damaged or decayed condition as to make the same a total loss. They averred that they received the fruit at destination and paid the freight under protest. Plaintiffs make the same averments as to the custom relative to shipments of fruit which they did in relation to the first shipment, their reliance upon the custom and as to their reliance upon the representations of the agent of the Northeastern Railroad, that the fruit would go to destination in the cars Nos. 9498 and 9224, in which they were loaded. They charge also, as they did in the matter of the first shipment, that owing to the carelessness and negligence of each of said defendant companies, and in violation of their duty, the fruit while in transit to destination was, at some point unknown to plaintiffs, carelessly and roughly transferred from said fruit cars to two ordinary closed box cars of the Louisville & Nashville Railroad Company, and said fruit was delivered in Pittsburg by the Baltimore & Ohio Railroad Company, in said box cars, in a broken, damaged and decayed condition; that transfer from fruit cars, with ventilators and gratings, into closed box cars, caused the said fruit to become mature and overripe and so to decay and become worthless, and that by the carelessness and rough handling of said fruit from said fruit cars into said box cars, the boxes in which said fruit was packed were broken and smashed

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and the contents thereof scattered, smashed, damaged and decayed, as aforesaid.

The Baltimore & Ohio Railroad Company and the Baltimore, Ohio & Southwestern Railroad Company answered, and averred that if the damages to the fruit, alleged in the petition, were sustained, which they denied, such damages were not due to any fault or negligence or dereliction on the part of either or both of them, or any of their officers or employees. They claimed the benefit of each and every stipulation contained in the bills of lading.

The other defendants admitted that by bills of lading of May 10 and June 27, 1892, the New Orleans & Northeastern Railroad Company received three hundred and sixty-five boxes of lemons and seven hundred and fifty boxes of lemons and seventy-one half boxes of lemons, as would appear by said bills of lading, for transportation over its lines and over the lines of connecting carriers for delivery in Pittsburg. They averred that said fruit thus received by them was safely and properly, and without other loss than was due to inherent defects of said fruit, conveyed by them and delivered in due time and without unnecessary delay in Cincinnati, Ohio, to the Baltimore, Ohio & Southwestern Railroad Company, a connecting line over which these respondents had no control; that no change was made by respondents, while said fruit was on their lines of the cars in which it was being carried, but that said cars containing said fruit as packed in New Orleans were by them safely and well, and under all the conditions of the bills of lading, delivered to said connecting lines of these respondents; that if any change was made or any damage or loss was occasioned thereby it was made and occasioned after said fruit cars had been delivered to said Baltimore, Ohio & Southwestern Railroad Company. They specially averred that as appeared by the bills of lading it specially agreed and contracted between the shippers of the fruit and respondents: "That articles agreed to be transported to points beyond the line of their company may be delivered to connecting lines for transportation to their destination, and that upon such delivery the responsibility of this company shall cease, except as to the guarantee of the rates to be charged thereon." That by this express limitation of the liability and by reason of the facts as set out they were in no wise responsible for such loss or damage as complained of in the petition.

The court rendered judgment in favor of the defendants, and plaintiffs appealed.

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The opinion of the court was delivered by

NICHOLLS, C. J. The record shows shipments of fruit from New Orleans to Pittsburg, Pa., at the dates mentioned in the petition. The bills of lading were issued from the office of the Northeastern Railroad Company. They acknowledge receipt by that company from the shipper in apparent good order of the packages mentioned therein (contents unknown), to be transported and delivered in like good order to their place of destination, subject to conditions noted in the bills. The conditions were:

" 1. That the freight and charges thereon shall be paid by the consignee upon the delivery of the same in lots, or parts of lots, and within twenty-four hours after their arrival at their destination.

2. That articles agreed to be transported beyond the lines of the company may be delivered to connecting lines for transportation, and that upon such delivery the responsibility of this company shall cease, except as to guarantee of the rates of freight to be charged thereon.

" 3. That this company and connecting lines shall not be liable for any breakage of glass or leakage of liquids, or for loss or injury resulting from the perishable nature or inherent defects of said packages or their contents.

" 4. That this company and connecting lines shall be responsible as warehousemen only and not as common carriers, for the safety of said packages and their contents, while in the depot after arrival at their terminal stations.

" 5. Claims for loss or damage must be made at the time of delivery of the goods to the consignee.

" 6. Double the rate in the bill of lading will be charged on all excess in weight over that given by shippers."

Across the face of the bills of lading are stamped the words: "Leakage," "Breakage," "Wastage," "Decay, Chafing and Wet. Owner's Risk."

The bill of lading for the first shipment called for three hundred and sixty-five boxes of lemons, instead of two hundred and ninety-seven boxes of lemons and sixty-eight boxes of choice oranges.

The fruit was shipped in fruit ventilator cars, not in ice or refrigerator cars. There is no charge in the petition that the cars were in bad order at the time of departure from New Orleans, or that any defect in the same or in their appliances which developed during the trip to

Cincinnati, was attributable to any fault of the company. The cars were seen by the shippers and accepted, and one of their witnesses stated they were good cars. It is quite probable they knew nothing beyond the fact of their general appearance, for the report of their inspection at Cincinnati shows them to have been old cars in general bad condition, particularly car No. 2924, which was one of the two cars in which the second shipment was made, which was found to have a wrong pair of wheels, two wrong oil boxes, broken centre plates and broken draft timber bolts. The draw bars in both of the cars were liable to pull out, breaking the train in two and causing an accident.

The New Orleans & Northeastern Railroad Company, the Alabama Great Southern Railroad Company, and the Cincinnati, New Orleans & Texas Pacific Railroad Company are roads south of Cincinnati. The other roads appear to be separate, distinct corporations. What their special business arrangements with the other roads were does not appear. They acted as connecting companies on the occasion of these shipments, and seem to have for some time previous frequently transferred red cars, loaded with fruit, from Cincinnati to Pittsburg, but one of the witnesses testified that the companies south of Cincinnati had no authority to make contracts with shippers at New Orleans, binding the Baltimore, Ohio & Southwestern Railroad Company and the Baltimore & Ohio Railroad Company to carry fruit between Cincinnati and Pittsburg in any particular kind of car.

The Baltimore, Ohio & Southwestern Railroad Company has occasionally, not regularly, special fruit cars at their command. The testimony shows a tacit understanding resulting from custom between the New Orleans & Northeastern Railroad Company and shippers of fruit from New Orleans northward, that the fruit would go on to destination in the car in which it was shipped without transfer, but with the understanding also that transfer should be made when cars break down, if they can not be repaired so as to run through.

The different roads at Cincinnati have at that point a joint inspection bureau for the purpose of inspecting cars brought there for the purpose of determining whether their condition is such as to justify their going forward. Under the rules the car is delivered to the connecting road, and if found in bad condition, not repairable in twenty-four hours, its contents are transferred to another car, and the defective car is returned to the company from which received.

When the cars in question (those of both shipments) reached Cincinnati they were found to be in defective condition, needing repairs before they could go further. They were accordingly transferred to another track for repair. The nature of the repairs was such as to require a detention of several days.

This fact carried with it the necessity of transferring their contents to other cars. When the first shipment reached Cincinnati the Baltimore, Ohio & Southwestern Railroad Co. (the company which received it at that point and transferred the same to the Baltimore & Ohio Railroad Company), having no "fruit ventilator" car to which the transfer could be made, ran an ordinary box car on a track parallel to that on which the New Orleans car was standing, threw a plank or planks across to make connections between the cars, and transferred the boxes of fruit over to the box car. The doors of the box car were left partly open and slatted for ventilation, and on this car and on the same evening the fruit was shipped forward.

The difference between an ordinary box car and a ventilated fruit car is that the former, when closed, has no ventilation, while a fruit car is provided with ventilators on the sides of the car near the ends and ventilators in the door. When the second shipment reached Cincinnati the fruit was removed in boxes from the fruit cars in which they were, to cars of similar make, and in the same manner as the first shipment had been transferred, and after being so transferred were forwarded on the same evening to Pittsburgh. No "delay" occurred in either of the shipments from the transfers made or at any time from the defective condition of the cars. The usual time taken for the delivery of fruit from Cincinnati to Pittsburgh is about forty-eight hours. The first shipment reached Pittsburgh on the morning of June 5. The consignee was notified of its arrival between seven and eight o'clock on the same morning. He called for the goods on the same day, but, according to the testimony of the local freight agent of the Baltimore & Ohio Railroad Company at Pittsburgh, when the car was opened he objected, claiming that the fruit had started in an ice car from New Orleans, and as it had been transferred *en route*, it was damaged; that the fact that such transfer had been made had damaged the fruit. He refused to receive the lemons, and would not have them until he had communicated with the shipper at New Orleans. He left the station. The

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agent called on him the day following, but was unable to get any further information from him, and was compelled to leave the matter as it stood. The consignee claimed that owing to the fact that the fruit had been transferred to an ordinary box car it was made more susceptible to decay. The consignee and several of his employees examined the fruit. He refused to receive it upon first inspection, and declined to have anything to do with it, or give any instructions as to its disposal, or to aid, in any way, to take care of the fruit. It was unloaded from the car to the platform on the second day after its arrival (June 7) and put in safety in the warehouse. After the consignee's refusal to accept the fruit the company was compelled to dispose of the same at a forced sale, to the best advantage possible, in order to make out of it as much as possible. The Pittsburg Produce Commission Company sold the lemons and obtained gross receipts amounting to five hundred and eleven dollars and seventy-five cents. The expenses, drayage and commission amounted to seventy-three dollars and thirty-eight cents, leaving a net balance, which was paid to the company, of four hundred and thirty-eight dollars and thirty-seven cents, from which it deducted the freight charges, one hundred and fifteen dollars and fifteen cents, leaving a balance of two hundred and eighty-three dollars and twenty-two cents, which the company deposited in bank. The original cost of this fruit at New Orleans was five hundred and ninety dollars and thirty cents. The condition of the fruit of this shipment at Cincinnati was not shown.

The second shipment reached Pittsburg July 3. Epplerheimer (the local freight agent, whose testimony, in regard to the first shipment, we have just quoted) testified that the consignee was notified the same day between seven and eight o'clock in the morning. The same day the consignee called and claimed that the fruit had been transferred from ice cars to fruit cars, and was, consequently, damaged. The consignee finally, on the 5th of July, took away the fruit. He claims that he did so under an agreement between some of the employees of the Baltimore & Ohio Railroad that he should be permitted to do so; sell it to the best advantage he could, and be paid for whatever loss should be shown to have been suffered by reason of the condition of the fruit when received, but this is positively denied by the defendant and is not established. The fruit was, however, received under protest. The consignees sold the fruit at dif-

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ferent dates at private sale, sometimes by the box, sometimes by the dozen. They introduced testimony to show that a large part of it had to be thrown away when in their hands by reason of its decayed condition. The dates of sales and names of purchasers are not given. It is shown that a part of the fruit was in their hands a very considerable time after they received it. The amount received from the sales amounted to five hundred and ninety dollars and ninety cents under the testimony.

Plaintiffs after receiving the fruit wrote the following letter to the Baltimore & Ohio Railroad Company:

To B. & O. Freight Agent:

DEAR SIR—We shipped from New Orleans two car loads of seven hundred and fifty-seven boxes of lemons and seventy-one half boxes of oranges. This fruit was shipped from New Orleans direct to Pittsburg in cars Nos. 9224 and 9889. In place of that we received the fruit in a bad condition, the fruit having suffered from being transferred to other cars; we having received them from cars 15,794 and 15,064. Therefore we now claim one dollar on each box. We have lost much more, but we will be satisfied to arrange it that way, because if fruit had been shipped as per agreement it would have come in good order, as moving it is what spoils it.

AUGUSTINO CORSO & Co.

In the examination of this case our attention was first directed to the claim of the plaintiff as against the Baltimore, Ohio & South-western Railroad Company and the Baltimore & Ohio Railroad Company. We find no liability on the part of either one of those companies. Plaintiffs' pleadings show that they did not expect of the companies connecting with the New Orleans & Northeastern Railroad Company any duties other than that of receiving at Cincinnati the cars in which the fruit was packed at New Orleans and of transporting the same on to destination.

Plaintiffs themselves made no direct contract with those companies in regard to these particular shipments and the terms and conditions under which these various companies did business, among themselves, are not shown. It is shown, however, that the New Orleans & Northeastern Railroad Company had no authority to make contracts on their behalf with shippers at New Orleans, binding them to carry fruit between Cincinnati and Pittsburg on any particular

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kind of car. We think that the companies beyond Cincinnati, in their dealing with the companies south of that city, looked generally to hauling the latter's cars and not to furnishing any of their own. That if called on to furnish cars of their own, it would simply be in some exceptional case or cases where a transfer of the contents of the cars of other companies to those of their own would become necessary, in consequence of the defective condition of those in which they arrived at Cincinnati. Cincinnati is not an initial shipping point for fruit going North or East, and the companies leading out of that city to the East are not called on to provide themselves with, and keep on hand, what is known as fruit ventilator cars, to meet the possible contingency of an accident, creating a special call for cars of that description.

When, on its being ascertained at Cincinnati that the cars on which these shipments of fruit were made were in a condition such as not to admit of their being carried further, application was made to the Baltimore, Ohio & Southwestern Railroad Company to ship the fruit to Pittsburg, the latter company could do nothing more than express a willingness to do so with the means it had on hand. The other companies were free either to accept or decline shipping it on such cars as that particular company had. If they thought proper to accept, they could not, afterward, bring forward as a ground of complaint against the forwarding company that their cars should have been fruit and not box cars, and if the companies south of Cincinnati could not themselves do this, so neither could the shipper at New Orleans. If any liability resulted from the mere fact of a transfer of the fruit from the cars belonging to the Northeastern Railroad to cars belonging to the Baltimore, Ohio & Southwestern Railroad Company, or the mere fact itself of a transfer from a fruit car to a box car, it would be a liability not of the Baltimore, Ohio & Southwestern Railroad Company, but of the Northeastern Railroad Company to the plaintiffs. As a matter of course, the Baltimore, Ohio & Southwestern Railroad Company and the Baltimore & Ohio Railroad Company would be liable for any damage resulting from their improper handling of the fruit, or for any other legal cause after they received the same. We find no evidence of fault on their part. The fruit was properly handled; the first shipment was as well ventilated as it could be made to be in a box car; the second shipment was in ventilated cars; both

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shipments went, without delay, to Pittsburg, and were there tendered for delivery. If there was any deterioration of the fruit between Cincinnati and Pittsburg, during the short time required for transmittal from one of these points to the other, it was due to causes for which the Baltimore, Ohio & Southwestern Railroad Company and the Baltimore & Ohio Railroad Company, under the bills of lading, were not liable, viz.: the perishable character of the articles themselves under the influence of the summer heat.

The testimony shows that fruits are perishable articles, greatly affected by heat, and more or less injury to it from that cause, in summer, is likely to occur.

We are of the opinion that the judgment appealed from, as it concerns the Baltimore, Ohio & Southwestern Railroad Company and the Baltimore & Ohio Railroad Company, is correct, and it is hereby affirmed.

We have next to ascertain whether the claim against the other companies be well founded or not. The Alabama Great Southern Railroad Company and the Cincinnati, New Orleans & Pacific Company seem to have taken no part in the matter of these shipments, other than that of hauling the cars of the Northeastern Railroad Company over their respective roads. There is nothing in the record to raise even a suspicion of fault on their part. The question then becomes narrowed between the plaintiffs and the New Orleans & Northeastern Railroad Company.

The bad condition of the cars on which the fruit was shipped at New Orleans when they reached Cincinnati is established by the testimony offered by the New Orleans & Northeastern Railroad Company itself. That bad condition had no effect upon the length of time the fruit was upon the road, either between New Orleans and Cincinnati or New Orleans and Pittsburg, but did have the effect of causing a transfer of the boxes of fruit from the cars of the New Orleans & Northeastern Railroad Company to those of the Baltimore, Ohio & Southwestern Railroad Company at Cincinnati. We think there was no damage done by the handling of the fruit at that point. It seems to have been transferred with care and without injury. We see no reason to suppose that the transfer made of the boxes of fruit of the second shipment to the cars of the Baltimore, Ohio & Southwestern Railroad Company from those of the New Orleans & Northeastern Railroad Company had changed the condition of the

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fruit from that in which it would have reached Pittsburg had the change not been made. The cars of the two roads in this instance were identical, all of them being fruit ventilator cars. The testimony shows what would not seem to be matter very difficult of proof, that the lifting of a number of boxes of fruit from one car and taking the same across a plank a distance of fifteen or twenty feet over to another car and there depositing them would not produce any damage, where no physical injury was done in making the change. We think that any loss sustained by the plaintiffs, on the second shipment, was due to the perishable character of the article shipped under the influence of the summer heat.

We next examine the effect of the transfer at Cincinnati of the boxes of the first shipment from the fruit ventilator car of the Northeastern Railroad to the box car of the Baltimore, Ohio & Southwestern Railroad Company. We think the condition of the fruit of this shipment, when it reached Pittsburg, was worse than some of defendants' witnesses claim it to have been. We notice an item of four dollars in the bill of charges of the Pittsburg Produce Commission Company in the matter of the sale of that fruit for hauling refuse to dump, which is significant. Meyers, the president of that company, says the bulk of the lemons were in good condition; some of them almost worthless; the oranges almost worthless; good sound stock would have brought from fifty to seventy-five cents a box more than that for which they actually sold. What number of boxes were sold, either of oranges or of lemons, or at what rate per box they were sold, does not appear. The condition, however, would be a matter of no moment, unless it resulted from some fact making the Northeastern Railroad Company responsible for it. Defendant calls our attention to the fact that the condition of the fruit which was shipped through from New Orleans to Pittsburg in the ventilator cars was no better than that forwarded from Cincinnati in the box car, but it is not safe to reason from one of these shipments to the other—the conditions might have been different in the two cases. The short time, however, which elapsed between the placing of the fruit in the box car at Cincinnati and the arrival of that car at Pittsburg disinclines us to attribute its final condition exclusively to the fact of its having been shipped in such a car. It is true, it was not fully ventilated, but the doors were left partially open and were slatted. It is probable the condition may have been made worse by

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that fact, but how much more so we could not say. We are inclined to think it would have reached Pittsburg in a damaged condition, to some extent, even if no transfer of the cars had been made, and it is to be noted that several days elapsed after the fruit reached Pittsburg before the boxes were placed in the hands of the Pittsburg Produce Commission Company for sale, by reason of the action of the consignee in declining to receive it. It was the duty of the consignee to have received it and tested the liability of the defendant for the damage, if any had been sustained, as the acceptance of the goods would not have affected that question. *Shaw vs. South Carolina Railroad Company*, 5 Richardson's Law Rep. (South Carolina) 462.

It would be an extreme case which would justify a refusal by a consignee to receive freight when notified (*N. O., Jackson & Great Northern Railroad vs. Tyson*, 46 Mississippi, 729). Even if the defendant were liable to plaintiffs, the New Orleans & Northeastern Railroad Company would not be so as claimed. Plaintiffs practically make it a forced purchaser of the fruit at highest market rate (as estimated by themselves) at Pittsburg, and this without deduction of freight or anything else.

The District Court was of the opinion that the plaintiffs had not made out a case for damages, with a reasonable degree of certainty. We are asked to say it erred in that respect. We do not think we are authorized to do so. Certainly not as to the second shipment.

The transfer of the fruit to another car at Cincinnati was permissible under the custom, on which plaintiffs rely, if the condition of the car in which it was did not justify its going further, unless defendants were charged with fault in respect to that very matter. As we have said no such charge is made in the present pleadings, and plaintiffs themselves accepted the cars offered.

We think the ends of justice will be best subserved by affirming the judgment as concerns the second shipment of fruit, reversing it as to the first shipment, and entering a judgment of non-suit on that branch of the case.

It is ordered, adjudged and decreed that the judgment appealed from be amended by dismissing as of non-suit, instead of rejecting finally, so much of plaintiffs' demand as refers to the shipment of fruit made by them on the 30th of May, 1892, through the New Or-

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leans & Northeastern Railroad Company, and that, as so amended, the judgment appealed from be and the same is hereby affirmed; cost of appeal to be paid by appellee.

No. 12,114.

THE POLICE JURY OF THE PARISH OF LAFOURCHE VS. THE POLICE JURY OF THE PARISH OF TERREBONNE.

The reasoning of the court is no part of the decree, and when the decree is ambiguous or conflicting in its terms, consistently with the authority the law attributes to *res judicata*, the court may construe the decree so as to reconcile repugnancy in its expressions and make it effective.

A PPEAL from the Eighteenth Judicial District Court for the Parish of Terrebonne. *Caillouet, J.*

Clay Knobloch & Son for Plaintiff, Appellee.

L. F. Suthon and J. C. Briant for Defendant, Appellant.

Argued and submitted May 21, 1896.

Opinion handed down June 1, 1896.

Rehearing granted June 15, 1896.

Argued and submitted on rehearing June 22, 1896.

Opinion handed down June 25, 1896.

The opinion of the court was delivered by

MILLER, J. The plaintiff, the police jury of Lafourche, sought by this suit to enjoin the police jury of Terrebonne from collecting licenses of oyster fishermen pursuing their vocation within the limits of Lafourche, because east of a boundary claimed to be established as that of the parishes of Lafourche and Terrebonne by the judgment of this court, and the petition also claimed judgment for the amount of such licenses alleged to have been collected by the parish of Terrebonne. There was the exception of prematurity, which being overruled the defendant answered, insisting that the boundary of Lafourche and Terrebonne was not that relied on by plaintiff, controverting the interpretation of plaintiff of the judgment of this

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court in regard to the boundary of the parishes, claiming that the territory in respect to which the plaintiff asserted jurisdiction was within that of the defendant, the parish of Terrebonne, and the answer denied liability for the licenses collected. From the judgment of the lower court, maintaining the boundary asserted by Lafourche, enjoin'ng license collections by the authorities of Terrebonne east of that boundary within the limits of Lafourche, and denying relief for the licenses claimed to have been illegally collected by the Terrebonne authorities, the defendant appeals.

The defendant, the parish of Terrebonne, strenuously insists that the territory within which Lafourche asserts jurisdiction is within the limits of Terrebonne. These parishes have had a previous contention on this subject reported in 34 An. 1230, Parish of Lafourche vs. Parish of Terrebonne. Created in 1822, the lines of Terrebonne were attempted to be adjusted in 1850 by the Act No. 97 of that year. The decision in 34 An. seems to have been ineffective for ending contention, and after fifteen years since its rendition the two parishes now confront each other on this boundary question, revived owing to their conflicting pretensions to collect the oyster bed revenues under the legislation of 1892. The contention is now confined to the lower portion of the eastern boundary of Terrebonne, which is thus defined in the acts: from the middle of the line drawn from the lower boundary of Ballet's plantation to the lower side of Lacoupe of Bayou Bœuf, thence on a line parallel with the Lafourche to within eighty arpents of the Bayou Terrebonne, thence winding around the settlement of the bayou to a distance of forty arpents from Bayou Lafourche, to be continued until a distance of eighty arpents from the Lafourche can be effected without encountering the limits of the lands on the Terrebonne; thence still at a distance of eighty arpents from the Lafourche, on a line parallel with that bayou to the Bayou Blue Water, the right bank of which to the sea shall be the eastern boundary. In the previous litigation one contention was as to the winding line, and the court determined it continued until a point eighty arpents from the Lafourche can be reached without encountering the lands on the Terrebonne. 34 An. 1232, 1234. The decision, it is claimed, is *res judicata* of the present controversy as to the bayou, with which the eighty-arpent line connects. The discussion in that case, in part directed to the extent of the winding line, when the opinion

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came to deal with the prolongation of that line it was made to connect with the Bayou Chene. That connection, we think, is demonstrated to be impossible. The Chene is not mentioned in either legislative act of 1812 or 1850, which of course were to be the guides of the court. The court observed that extracts from the American State papers of confirmations of lands on the Bayou Blue Water led to the conclusion that the Chene was the eastern boundary. The conclusion of the court in its opinion is at variance with the statutory boundary and irreconcilable with the line to be drawn and the location of the Chene. The previous decision determining the end of the winding line, nothing remained but the extension of that line parallel with the Lafourche and eighty arpents from it, until the Blue Water was reached. Yet the court, in its opinion, assumes that Bayou Chene was to be reached by the prolonged line. The testimony and the maps show that the prolonged line strikes the Blue Water and not the Chene. Bayou Blue or Bleu extends from the west of the parish until it loses itself near the Lafourche on the east, but before reaching the Lafourche the Blue unites itself with the Bayou Blue Water, which pursues its way to the sea. The eighty-arpent line begins above both bayous, and must strike the Bayou Blue Water, or, as the testimony shows, does strike the point where that bayou unites with the Blue. Bayou Chene or Du Chien is south of Bayou Blue, west of the Blue Water, pursues its course to the sea beyond the reach of any line parallel with the Lafourche in all of its course east of Bayou Blue, and still further east of the Chene. The Chene and the Blue Water are totally distinct and not connected. From the earliest and all times they have been distinguished. No one could find the Bayou Blue Water, otherwise called the Chene, mentioned in the opinion, but each are well known. Bayou Blue Water coincides with the extension of the eighty-arpent line called for by the legislative acts, and gives the parish a definite boundary. Bayou Du Chien practically gives the parish no boundary, because disconnected with that line. If, therefore, the reasoning of the court, in reference to Bayou Chien, leads to an impossible result, if that expression may be permitted, it seems to us it must be discarded.

The reasoning forms no part of the decree. *Pepper vs. Dunlap*, 5 An. 200; *Keane vs. Fisher*, 10 An. 261. It may be claimed that the reasoning and the decree coincide. The decree is that Bayou

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Blue Water, otherwise called the Du Chene, following its course to the sea is the boundary. The decree contemplates one continuous bayou coinciding with the eighty-arpent line. It can not apply to the Du Chene, because it is not and can not be connected with the eighty-arpent line, nor part of or connected, in any way, with the Bayou Blue Water. Besides, Blue Water is not and never was known as Bayou Du Chene. Construing this decree as requiring one continuous bayou extending to the sea, connected with the eighty-arpent line, called the Bayou Blue Water, we must hold that to be the boundary, and disregard the additional name the court applies by the expression "otherwise called Du Chien," entirely distinct from the Bayou Blue Water and utterly repugnant to the boundary, in other respects fixed by the decree itself.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and it is now adjudged and decreed that from the point where the line winding round the settlements on Bayou Terrebonne reaches a distance of eighty arpents from the Bayou Lafourche without encountering the limits of the land on the Terrebonne, fixed in the decree of this court in the suit of these parties, rendered on the tenth day of April, 1882, that the eastern boundary of the parish of Terrebonne is hereby decreed to be a line parallel with the Bayou Lafourche, still, at a distance of eighty arpents from it to the Bayou Blue Water, following its right bank to the sea, and that the oyster beds west of that line be decreed to be part of said parish of Terrebonne, and that the decree of the lower court, in respect to the money demand of the parish of Lafourche, be affirmed, the plaintiff, appellee, to pay costs.

ON APPLICATION FOR REHEARING.

In view of the importance of this case and the aid to a correct decision it is urged the court will derive from additional testimony and reargument, it is ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed; that the former judgment of this court be set aside, and it is further ordered and decreed that this case be and it is hereby remanded to the lower court for another trial.

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No. 12,127.

HENRY B. HEWES ET ALS. VS. JOHN P. BAXTER.

The executor and tutor of the minor heirs of the testator who takes charge of property of a partnership of which the deceased was a member, the other partners giving the property no attention, is not to be deemed an intermeddler, but however his control of the property may be regarded, he acquits himself of all responsibility by proper care of the property and its faithful application in discharging the partnership liabilities. Civil Code, Arts. 2295, 2299.

While the exercise of the right of suffrage in this State has its influence in solving the question of domicile of a party, it is not conclusive, and in the determination of such question the nature of the domicile the party is supposed to have here, the purpose that brought him to the State, the time he spends here and elsewhere, where his wife and family are, his declarations and conduct, must all be considered in ascertaining his domicile. Succession of Franklin, 7 An. 395.

A PPEAL from the Nineteenth Judicial District Court for the Parish of Iberia Voorhies, J.

Foster & Broussard and Beattie & Beattie for Plaintiffs, Appellants.

Philip H. Mentz and Walter J. Burke for Defendants, Appellees.

Argued and submitted June 5, 1896.

Opinion handed down June 22, 1896.

The opinion of the court was delivered by

MILLER, J. The plaintiffs appeal from the judgment dismissing their suit and dissolving their attachment.

It seems that the firm of Milmo, Stokoe & Co., composed of B. Milmo, Mrs. Stokoe and Henry B. Hewes, was dissolved by the death of Milmo. Another member, Mrs. Stokoe, died. Baxter, the defendant, became executor of Milmo and tutor of his minor children, and the heirs of Mrs. Stokoe were represented by their uncle, J. W. Stokoe. There was a suit for the partition of the partnership property succeeded by another, for the settlement of the partnership, in which a liquidator was appointed. Then came an agreement intended to end litigation, dispensing with the liquidator and proposing that the partnership debts outstanding should be collected, its other assets realized and its liabilities discharged by Baxter, the

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executor of Milmo, and tutor of his children, Stokoe, as tutor of his children, and Hewes. Baxter represented the largest interest, ten-eighteenths; of the remaining interest the Stokoe heirs owned three-eighteenths and Hewes five-eighteenths. The attempt at liquidation by the representatives of the interest of the heirs and Hewes utterly failed. They disagreed about selling property, employing laborers, paying debts and other details of the business. Owing to these dissensions between the parties, the liquidation was obstructed, the partnership property exposed to seizure by creditors and the interest of all concerned menaced. Stokoe and Hewes ceased to exert any control. Of course, they had their complaints of Baxter, and the record shows that he imputes to them neglect and violations of their duties as liquidators. It is not requisite to pass any judgment as to those differences, but the result was that Stokoe and Hewes seem to have abandoned all participation in the settlement of the partnership, and the care and disposition of its property; the collections from its debtors and settlements of its liabilities were assumed by the defendant, aided by his nephew, one of the heirs of the deceased partner, Milmo. This administration of the defendant lasting some months resulted in realizing the partnership property and paying its debts.

This suit brought by the heirs of Milmo, Hewes and Stokoe, representing the heirs of the other partner, Mrs. Stokoe, seeks to hold Baxter, the defendant, as an intermeddler with the partnership property. One of the plaintiffs, Baxter Milmo, suing individually as heir of his father, the member of the firm, and as tutor of the minor heirs, participated with the defendant in the administration charged in the petition to have been intermeddling or an illegal assumption of control. The defendant, as executor or tutor, rendered the account we find in the record. It is our inference that the account is that filed in the succession of Milmo. Neither briefs nor the record, unless our examination has overlooked it, give us information of the rendition of this account. We gather from the record that books were kept during the defendant's gestion, the entries in large part made by the nephew, one of the plaintiffs, and we presume there was thus furnished the basis for the account, the copy of the debit side of which is annexed and made part of the petition. These debts are the amounts derived by the defendant during his administration from the sales of the partnership property

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and collection of its assets, and judgment for the entire amount of these debits is demanded on the allegations in substance, of defendant's wrongful intermeddling with the assets and property from which were derived the amount for which he is sued.

The answer in substance is that, as the executor of Milmo and tutor of his children, the defendant was constrained to give attention to the property of the partnership of Milmo, Stokoe & Co.; avers the agreement under which he, with Hewes and Stokoe as tutor, were to take charge, and the dissensions and other circumstances which led to the control exerted by defendant and his nephew, one of the plaintiffs. The answer admits the accounts attached to the petition, but avers that all that was realized by defendant was faithfully applied to the debts and liabilities of the partnership and payments to the Milmo heirs, and that the account on the books then under plaintiffs' control will show that application.

The lower court, after hearing the testimony, making a huge record, dismissed the plaintiffs' demand, dissolved the attachment, and this appeal by plaintiffs followed.

We do not appreciate that Baxter, under the circumstances, can be deemed an intermeddler. He was the executor and tutor of the minor children of Milmo, representing as such more than one-half interest in the property. By the agreement he was entitled to participate in the liquidation. The testimony does not impress us it was his fault that Hewes and Stokoe withdrew from the liquidation. If they had cause of complaint of the defendant, they might have sought the court to have some one put in charge. Instead, they seem to have abandoned all charge. It is in proof that Stokoe refused to sign checks to pay debts, and Hewes, though not as pronounced in opposition to the joint liquidation agreed upon, concurred to some extent, at least, in the course of Stokoe. At any rate Baxter with the large interest in his hands found himself under the necessity of abandoning control or provoking anew the appointment of a liquidator with useless expense, all had agreed to avoid, or continuing his attention to the business. We can not perceive that this determination in itself is to fasten on him a liability. The Code recognizes the liability arising on the part of one who takes on himself the management of another business. It can hardly be said in this case that Baxter "of his own accord," as the Code puts it, undertook this business. In some sense, at least, it was imposed on

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him by his responsibility as executor and tutor. The agreement accorded with that responsibility, and although Hewes and Stokoe declined continuing the liquidation, it did not leave Baxter in the position of an intruder. Civil Code, Article 2295, *et seq.* In this point of view it remains to inquire into his administration, whether marked by the care and prudence the Code exacts. Even if he could be deemed an intermeddler, if he has faithfully administered, there can be no liability. Still less can he be made subject to a liability because acting for the interest of all with an agency that might be deemed implied by full knowledge of his course on the part of Hewes and Stokoe, with no effort on the part of either to take control from him or any action on their part evincing any concern in the business.

On the threshold of the examination of defendant's receipts and expenditures while in charge of the partnership property we are met by the objection to the books in which the defendant kept his account, the entries in which were in large part made by his nephew.

We gather from the record the credit side of the account is from the books. In the testimony the direct and cross-examination refers to the books. We think the lower court properly overruled the objection, and defendant, as a witness, testified to the items of the account from his own knowledge.

We do not find in the petition any allegations of sacrifice or loss of assets. The plaintiffs' brief alludes to the deposit of the money of the estate in a Milwaukee bank. If this refers to the funds in the defendant's hands, as executor, the deposit might be the subject of investigation in the succession proceedings, and we perceive his account was filed as executor, and the controversy appears to have been confined to specific items. But unless this deposit was followed by loss, it is of no pertinence in this discussion. The substantial charge in the petition is that defendant in the course of his alleged intermeddling collected certain amounts, and has failed to account. The collections are admitted. We are not, except to a very limited extent, aided by plaintiffs' brief, with any specifications of the collections not accounted for, and in the brief there is a discussion with reference to a charge by defendant for salary, another for sums paid for support of the Milmo children, which appears in his account as executor, and the brief claims besides, under any aspect of the case, judgment for the difference between debits and credits. One of the plaintiffs, Hewes, in his testimony, referring to the books and to the

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credit side of the account, states his ignorance as to many of the charges, admits some few, and to those thus admitted it is claimed the defendants' credit should be restricted. It was natural, in our view, the witness, giving but little attention to the business, should not have the knowledge of every particular item, but it is not easy to appreciate that if defendants' account of over four thousand dollars of collections and expenditures was not in the main correct, that the witness would not have been able to make that statement. But we perceive, in the course of his examination, being asked to point out one charge not necessary for the concern, answers, did not see any were necessary, because under the agreement no money was to be touched. This is to be understood, we think, not as a denial of the correctness of the charges, but defendants' right to use the firm's funds after the disagreement. The answer, therefore, does not meet the issue made by defendant that every dollar he applied was for the firm's debts. This witness, pressed further to point out any item to the firm's detriment, indicates two or three small items; postoffice box rent and small expenses not amounting to more than a few dollars. On the other hand, we have the testimony of the defendant extending to the entire account given with a precision and detail that commends it to our acceptance. With plaintiffs' brief specially directed only to the charges to which we have alluded, we have endeavored to give attention to all the testimony in this record of two hundred pages, and we reach the conclusion that the defendant has accounted for the funds he received, the conclusion also of our learned brother of the District Court. This conclusion, of course, reserves the charges specifically disputed by plaintiffs.

There were charges for defendant's salary previous to what is termed the agreement. This was recognized by that agreement. The charge for salary since the agreement was at the same rate. In our appreciation the defendant's services were in the interest of the partnership. They tended to preserve its property. We think, under the circumstances, the charge for salary could not be subject of reasonable objection. If his commissions as executor are to be considered, they were paid by the succession, not by Hewes and the Stokoe heirs. They represent but eight-eighteenhs, and the proportion of the amount charged for salary to be borne by them is small considering the benefit the partnership property derived from defendant's services. As the sums in the account paid for the

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support of the Milmo heirs were in excess of the interest of their father in the partnership property, we think, as the suit is against the executor of Milmo, any question as to these sums should be referred to an adjustment of the partnership accounts. The defendant, as executor, is entitled to retain any amount to which the deceased Milmo is entitled.

The account exhibits assets realized by defendant amounting to four thousand six hundred and seventy-five dollars and seventy-five cents and expenditures amounting to four thousand four hundred and forty-four dollars and one cent. This account, sued on by plaintiffs, admitted by defendant, and to which all the testimony has been directed, is the test of his liability. While it is maintained by the lower court there is no proof of any debt and the same proposition is urged in defendant's brief, still there is the excess of collections over expenditures of two hundred and thirty-four dollars and seventy-four cents, for which, in our opinion, there must be judgment in favor of the plaintiff Hewes and the representatives of the Stokoe heirs to the extent of their proportions of interest in the partnership. The defendant still the executor of Milmo is entitled to retain the Milmo interest in the fund in his hands, for which he is accountable as executor.

On the right to attach we find that defendant came here about six years since, and, as we understand the record, the business in which he was engaged has ended. He is not a housekeeper. His wife left the State about two years ago, the climate not agreeing with her, has since lived in Michigan, defendant's original domicile, and where we think, under the testimony, he spends his time, with occasional visits to Iberia, in which the partnership was located and where the judicial proceedings connected with the partnership were conducted. When visiting Iberia on these visits we presume defendant lives at a hotel. It is in proof he was registered at a hotel as of Michigan. This, he claims was a mistake, but in his testimony he speaks of Manistee in that State as his home. The votes he cast here are entitled to weight, as is his vote for school directors in Michigan, but neither votes there or here are conclusive. Succession of Franklin, 7 An. 395. The facts that he left Louisiana, though temporarily, it is claimed; that his wife has been for two years continuously in Michigan; the time he spends there; the end of the business that brought him to Louisiana; that he had no dwelling

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here, accompanied with his own declaration Michigan was his home, all led us to the conclusion that he was a non-resident, and the attachment must be maintained.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and it is now ordered and decreed that the plaintiffs, H. B. Hewes, and John W. Stokoe, tutor of the minors, Neil and Mary Stokoe, do have and recover from the defendant, John P. Baxter, the sum of one hundred and four dollars and thirty-two cents (\$104.32) with legal interest, being eight-eightheenths of the balance in his hands, with privilege on the property attached, with costs.

No. 12,198.

STATE OF LOUISIANA VS. CLARENCE PARHAM.

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A declaration made by a person *in articulo mortis*, reduced to writing by his attending physician, signed by the declarant, and his signature attested by a justice of the peace, is admissible in evidence as a dying declaration, the only objection being that having been thus written, it was not in proper form, and, therefore, incompetent and inadmissible as secondary and hearsay testimony.

A PPEAL from the Twentieth Judicial District Court for the Parish of Ascension. *Guion, J.*

M. J. Cunningham, Attorney General, and *O. D. Billon*, District Attorney, for Plaintiff, Appellee.

Edward N. Pugh for Defendant, Appellant.

Submitted on briefs June 6, 1896.

Opinion handed down June 15, 1896.

Rehearing refused June 25, 1896.

The opinion of the court was delivered by

WATKINS, J. The defendant, having been indicted for the murder of John Clayton, was tried and convicted of manslaughter and sentenced to imprisonment in the penitentiary, at hard labor, for a period of six years, and from that verdict and sentence he prosecutes this appeal.

State vs. Farham.

The only question which is presented for decision is the admissibility *rel non* of an alleged dying declaration of the deceased which was offered in evidence at the trial. The record discloses that during the progress of the trial there was offered on the part of the State what purported to be the dying declaration of the deceased, to the introduction of which the defendant's counsel objected on the sole ground that the paper presented as a dying declaration was not one in point of fact, because it had not been written by a person authorized to take dying declarations; and said objection having been overruled and the paper admitted in evidence, he reserved a bill of exceptions to the ruling of the court.

The bill of exceptions states that defendant's counsel objected to the introduction in evidence of a paper purporting to be a dying declaration "on the ground that said paper, on its face, was illegal and inadmissible, the body being in one handwriting and the signature of the justice of the peace in another—said instrument showing that the body of the instrument was in the handwriting of a third person," etc. That the instrument of writing having been written by a third person, and only *signed* by a justice of the peace authenticating the signature of the deceased, it was mere hearsay and secondary evidence, and for that reason should not go to the jury.

That prior to the introduction of that paper in evidence, Thomas H. Stuckey was sworn as a witness and testified that while he had received the declaration it had been reduced to writing by the physician who was attending upon the deceased, because the latter wrote a more legible hand than he did.

On overruling the defendant's objection the trial judge made the following assignment of his reasons for admitting the paper in evidence, viz.:

"Before the dying declaration referred to was offered by the District Attorney and objected to by the defendant's counsel, the justice of the peace, Stuckey, who received the declaration, testified that he had the same reduced to writing by the attending physician, because the latter wrote a more legible handwriting, and for no other reason. He declared, however, that all the dying man said was contained in the dying declaration, which he read over to him after he had finished making it, and that the whole was done in his presence and in his hearing and under his supervision.

"In view of the foregoing and the fact that the justice avers that

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the dying man said what the declarations contained, I admitted the same in evidence."

The objection only relates to the *form* of the declaration, and does not extend to its *substance*. It does not raise the question as to whether a proper basis had been laid, preliminarily, for its introduction in evidence.

The paper is brought up in the original, and is appended to the transcript; and it appears to have been signed by John Clayton, the deceased, by his mark, in the presence of the Justice of the Peace.

To the paper is appended, immediately after the signature of the deceased, this jurat, viz.:

"In testimony whereof I have hereunto set my hand the day and year first above written.

" (Signed.)

THOS. H. STUCKEY,

"Justice Peace, Tenth Ward."

Same is commenced by the following caption, namely:

"State of Louisiana, Parish of Ascension. Be it known that on this 3d day of October, 1895, at 10:30 o'clock A. M., I, Thomas H. Stuckey, a Justice of the Peace, in and for the parish of Ascension, at the request of William Nettles, went to the house of William Nettles, in the parish aforesaid, to take the dying declarations of John Clayton; and it appearing to me that any statement the said John Clayton might desire to make would be made with a full consciousness of approaching death, I then and there proceeded to take the dying declaration of the said John Clayton," etc.

We are aware of no particular form in which a dying declaration must be couched; and counsel has referred us, in his brief, to no decision which suggests the necessity of any particular form, or ceremonial, to be observed in order that same be rendered admissible in evidence.

On the contrary, Mr. Bishop lays down the rule that the dying declaration may be "written or oral, be sworn to or not, come through an interpreter, be by a mere pressure of the hand or otherwise. If made before death seemed impending, they will be rendered good by repetition or assent afterward. If in writing, the writing must be produced in evidence of them. If oral, they may be orally proved, and the evidence will suffice.

"When the declarant leaves a statement so far unfinished that it appears probable he meant to qualify it by something further, it

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is not admissible; but his inability, or mere omission to go over the whole transaction, or to speak to another part of it, will not exclude from the jury what he has said." 1 Bishop Crim. Proc., Sec. 1213; Wharton's Crim. Ev., Secs. 287, 293; Commonwealth vs. Casey, 11 Cushing, 417; State vs. Daniel, 31 An. 91; State vs. Somnier, 33 An. 237.

Dying declarations are admissible whether made to an officer or to private persons, and they are none the less admissible because they have been made to the attending physician. State vs. Trivas, 32 An. 1086; Whar. Crim. Ev., Sec. 300; 1 Bish. Crim. Pr., Sec. 1213; State vs. Alexander Viaux, 8 An. 514.

In the course of the opinion of the Massachusetts court, in Com. vs. Casey, *supra*, is found this very pertinent paragraph, viz.:

"If the injured party had but the action of a single finger, and with that finger pointed to the words yes or no, in answer to questions, in such a manner as to render it probable that she understood, and was at the time conscious that she could not recover, then it is admissible testimony."

And the court held, in Jones vs. State, 71 Indiana, 66, that "where dying declarations are communicated by signs to one, and reduced to writing by another, but afterward read over to and signed by the deceased, who said they were correct, such written statement is competent evidence to go to the jury."

To like effect is McHugh vs. State, 31 Ala. 317.

The foregoing authorities make it clear that the declaration was in form unobjectionable, and was, consequently, admissible in evidence against the defendant.

That it was written by the attending physician, and the signature of the deceased subsequently appended and authenticated by a justice of the peace, does not militate against it.

The brief of defendant's counsel is chiefly confined to a discussion of the question of whether a sufficient basis had been laid for the introduction of the declaration, but it is not justified by the record, as it does not appear that this question was either raised or decided in the court below.

Judgment affirmed.

Orr & Laubenheimer Co., Ltd., vs. Wilson & Co.

No. 12,141.

ORR & LAUBENHEIMER COMPANY, LIMITED, vs. JOHN WILSON & CO.

Ship agents and fruit dealers having contracted for the lease of a vessel for use in their business, at a fixed price and for a definite term, deliverable about the 30th of July, 1894, are not at liberty to recede from their engagement at will, and decline to accept delivery, if tendered seasonably; and, having declined to accept delivery of the vessel when formally tendered to them on the 29th of July, 1894, they have become bound to the plaintiff as lessors in the full amount of the price stipulated in the contract.

An effort on the part of the lessors, subsequently to the defendants' default, to use the vessel so as to reduce their damages to a *minimum*, can not be viewed as an acquiescence in their abandonment of their contract, which defeats plaintiff's recovery.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Bernard Titcher for Plaintiff, Appellant.

Dart & Kernan and *U. Martinoni, Jr.*, for Defendants, Appellees.

Argued and submitted June 8, 1896.

Opinion handed down June 15, 1896.

Decree amended and rehearing refused June 25, 1896.

The opinion of the court was delivered by

WATKINS, J. This is an action in damages for the breach of a charter party, and plaintiff demands of the defendant the sum of two thousand one hundred and eighty-two dollars, as the compensation due therefor.

From a judgment of the court in favor of the defendant, rejecting plaintiff's demand, it has appealed.

The case of the plaintiff, as stated in its petition, is that in the month of July, 1894, it entered into a contract with defendant, whereby it agreed to lease or charter to the latter, who agreed to accept and pay for same, a certain steamship named *Sunniva*, for the period of one month, at the rate of four hundred and fifty pounds sterling, which are of the equivalent value of two thousand one hundred and eighty-two dollars and fifty cents in American currency.

That said contract was made by correspondence between the par-

Orr & Laubenheimer Co., Ltd., vs. Wilson & Co.

ties in the form of telegraphic dispatches—the plaintiff having carried on its correspondence through W. W. Hurlburt & Co., a firm of ship brokers of New York, who acted in the capacity of agents for the defendants, for whom the said firm had power and authority to contract.

That it attaches to its petition all the original telegrams which were received during the course of said correspondence, and copies of all those sent to and received by W. W. Hurlburt & Co.—the originals of the latter being in defendant's possession—as the evidence of the aforesaid contract.

That said vessel, *Sunniva*, was to be ready for the use of the defendants, according to the terms of the aforesaid agreement, "about the 30th of July, 1894, and that on the 29th of July, 1894, the said vessel being then in the port of Mobile, Ala., and ready for delivery," it was tendered to the defendants, and by them refused. That by said refusal and declination of said vessel defendants violated their contract and bound themselves for the aforesaid contract price of its lease, which it is entitled to recover.

The prayer of the petitioner is for judgment conformably to the foregoing allegations against the firm of John Wilson & Co. and the individual members thereof *in solido*.

Defendants excepted that proper parties defendant had not been made—insisting that, if any contract had been made such as the plaintiff describes, it was made and entered into "by plaintiff with the Bluefields Banana Company," and that if any action they have, it is against the latter, and not against the exceptors.

This exception was, by consent, referred to the merits.

For answer the defendants aver that their business was that of ship brokers and agents and fruit importers, and in said capacities the agents of the Bluefields Banana Company, a corporation organized and doing business at Galveston, Texas, and at Bluefields, Nicaragua and which has for its objects, among others, the operating and chartering of vessels from various points to Bluefields.

That while admitting the genuineness of the various telegrams plaintiff has declared upon, they aver that the contract represented therein for the charter of any vessel was for the Bluefields Banana Company, and that the plaintiff was well acquainted with the fact of this agency, and with the fact that John Wilson, whose name appears in said telegram, is the first vice president of the said com-

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pany, and that the transaction was for the use and benefit thereof.

"That whatever correspondence or transactions occurred with petitioners were made with John Wilson in his capacity of agent and first vice president of said company, and that any right of action, if any petitioners have, should be against the said Bluefields Banana Company, and not your defendants."

But in the alternative that the court should hold that they did enter into said contract, they aver that desiring to run a steamship from Bluefields, Nicaragua, to Mobile, Ala., for account of the Bluefields Banana Company in connection with another steamship, they opened negotiations with W. W. Hurlburt & Co., a firm of ship brokers in New York City, for the purpose of chartering a vessel. That the main object of these negotiations was to obtain a vessel immediately, and this fact was brought to the attention of plaintiffs, as well as of Hurlburt & Co., *at the opening of said negotiations*:

They aver that the steamship *Sunniva* was offered by said W. W. Hurlburt & Co., and accepted by the defendants on the above condition.

"That subsequently it was distinctly understood and agreed between plaintiff and defendants herein, that the said steamship *Sunniva* would be at Mobile on the 24th or 25th of July, as otherwise your defendants would not take her, and that this condition in the contract was fully understood and agreed to.

"That when the time agreed on had arrived, your defendants were at Mobile, ready and willing to perform their contract, and charter or lease said vessel; but that plaintiff neglected to perform their share of the contract and have the vessel delivered on time. That John Wilson, one of your defendants herein, waited patiently at Mobile until the 29th; and, the boat not arriving, notified plaintiff that the vessel could no longer be leased or chartered, as (they) had failed to perform their obligation, and defendants could no longer use the said vessel."

They specially "deny that plaintiffs have suffered any damages by reason of the dissolution of said contract, or that they are liable for the payment of the charter of said vessel;" and they aver that plaintiff acquiesced in their refusal to take the ship, by immediately employing her for their own account during the time she was to have been leased, deriving a profit therefrom, and thereby releasing them.

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The foregoing extracts from the pleadings leave only three questions open for our decision: (1) whether the defendants are personally bound on the contract, or charter party; (2) whether the vessel was to be ready for the use of the defendants "about the 30th of July, 1894," as claimed by the plaintiff, or on the 24th or 25th of said month, as claimed by the defendants; (3) whether the plaintiffs acquiesced in defendants' declination to accept the vessel, and released them from their engagement by making use of the vessel during the period of the contract.

Defendants' answer having admitted the veracity of the telegrams, and averred that *subsequently* it was distinctly understood and agreed between plaintiff and defendants herein, that the S. S. Sunniva would be at Mobile on the 24th or 25th of July," the contract stands conceded to be as alleged by the plaintiff, unless it can be shown differently by the defendants by fair preponderance of evidence.

We have appended the telegraphic correspondence, and for convenience have extracted same from plaintiff's brief, pages five and six, viz.:

"As the telegrams together make up a written contract, and as they completely set at rest the question of the time of delivery stipulated, we quote them in full:

"1. DOCUMENT P. A.

"*To Orr & Laubenheimer, Mobile, Ala.:*

"*'Have vale. Others open as per letter. Please advise anything required. What is lowest you will accept for balance Espana, Jaederen, Sunniva.*

"*'(Signed)*

W. W. HURLBURT & Co.'

"2. DOCUMENT MARKED P. A., BEING THE REPLY TO P. A.

"*'W. W. Hurlburt & Co.:*

"*'Jaederen 390, Sunniva 550.*

"*'(Signed)*

ORR & LAUBENHEIMER.'

"3. DOCUMENT P. B.

"*'NEW YORK, July 18, 1894.*

"*'To Orr & Laubenheimer, Mobile, Ala.:*

"*'Are offered three seventy (370) for Sunniva. Make us counter offer. As quick delivery as possible. Balance charter how long.*

"*'(Signed)*

W. W. HURLBURT & Co.'

Orr & Laubenheimer Co., Ltd., vs. Wilson & Co.

"4. DOCUMENT P. B., BEING THE REPLY TO TELEGRAM P. B.

"To W. W. Hurlburt & Co., New York:

"Sunniva four hundred and fifty, nothing less. One or two trips.

"(Signed) ORR & LAUBENHEIMER.'

"The next telegram in the series shows that Hurlburt & Co. now accept the price, but endeavor to obtain from Orr & Laubenheimer an agreement for an immediate delivery, namely:

"5—DOCUMENT P. C.

"NEW YORK, July 19, 1894.

"To Orr & Laubenheimer:

"Have closed Sunniva four hundred and fifty less address

"commission. When does charter expire? Confirm immediate delivery.

"(Signed) W. W. HURLBURT & Co.'

"6—TO THIS DOCUMENT P. C., IS A REPLY.

"To W. W. Hurlburt & Co.:

"Can not deliver until about 30th. Charter expires August 22.

"Answer.

"(Signed) ORR & LAUBENHEIMER Co.'

"7—DOCUMENT P. D.

"NEW YORK, July 19, 1894.

"To Orr & Laubenheimer:

"Closed Sunniva, Wilson two trips four hundred and fifty less

"usual address to Wilson. Please notify him when she is due.

"(Signed) W. W. HURLBURT & Co.'

"On July 29, 1894, one day before the time of delivery, Orr & Laubenheimer sent to John Wilson & Co. the following telegram: 'Sunniva unloading; what disposition shall we make of her? Answer quick.'

"To this Wilson & Co. replied on July 30, 1894, as follows:

"To Orr & Laubenheimer, Mobile, Ala.:

"Sunniva not arriving when wanted, we can not use her.

"(Signed) WILSON & Co.'"

This is the complete correspondence, and it shows that a lease of the Sunniva was closed on the 19th of July, at four hundred and fifty pounds sterling, leaving open the question of plaintiff's con-

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firmation of immediate delivery; but, on the same date, plaintiff wired the agents, Hurlburt & Co.: "*Can not deliver until about the 30th.*"

* * Answer."

Immediately the said agents replied as follows, viz.: "Closed *Sunniva*. Wilson two trips four hundred and fifty less; usual address to Wilson. Please notify him when she is due."

The plain meaning of this telegram is that the agents had accepted and closed the lease of the *Sunniva* for two trips at four hundred and fifty pounds sterling—less than the original offer of five hundred and fifty pounds—and that the plaintiff was to notify defendants at their usual address "when she was due."

In conformity therewith plaintiff wired defendants on the 29th of July that the *Sunniva* was unloading at Mobile, and wanted to know what disposition they should make of her—requesting a prompt answer.

On the following day the defendants replied as follows, viz.:

"*Sunniva* not arriving when wanted, we can not use her."

Considering that the plaintiff had plainly stipulated that they could not deliver "until about the thirtieth," and that defendants' agents had closed the transaction on that statement, the declination of defendants was a distinct violation of their contract, which rendered them liable for the price agreed upon.

This being the case, the question arises whether defendants have substantiated their averments that *subsequently* to this contract it "was distinctly understood and agreed between (them) and the plaintiff that the *Sunniva* would be in Mobile on the 24th or 25th of July."

But before considering that question it is well to state that, in our opinion, defendants' letter to the plaintiff of date August 6, 1894, with respect to the question of their default, puts at rest the question of their having made the contract upon their own personal account; in fact it is inferentially admitted.

The letter says:

"Messrs. Hurlburt & Co. write us that you will hold them responsible because we did not take the *Sunniva*. When your Mr. Laubenheimer was in our office here he distinctly stated that the *Sunniva* would be in on the 24th or 25th sure. As you know we were desirous of getting a steamer to run in connection with the Wilson on schedule time, that it would have suited us to have taken her, but up to the time of the

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writers leaving Mobile on the 29th there was no sign of the *Sunniva's* arrival; hence the writer decided not to take the ship."

Referring to the telegraphic correspondence, it will be discovered, that the question of "quick delivery" was discussed and finally settled between the parties on July 19. Hurlburt & Co. say in their telegram: "Have closed *Sunniva* * * * Confirm immediate delivery." To this the plaintiff immediately replied: "*Can not deliver until about the thirtieth.*"

In fact, she did arrive at Mobile on the 29th of July, and was then being unloaded when the plaintiff wired the defendants; and it was on *that very date* that John Wilson, of the defendants' firm, left Mobile and returned to New Orleans.

But the defendants, in that letter, do not say that the *original contract* had been changed, so as to make the date of delivery the 24th or 25th; but they affirm that when Mr. Laubenhimer was in their office "he distinctly stated that the *Sunniva* would be in on the 24th or 25th." That was in no sense the equivalent of an alteration of the original contract, for if it had been so considered by the defendants, then Mr. John Wilson need not have awaited her arrival *until the 29th*, as he claims to have done. His course of conduct tends to establish the contrary view.

Not only so, but on the 31st of July, 1894, immediately after John Wilson's return to New Orleans from Mobile, John Wilson & Co. write a letter to the Bluefields Banana Company at Galveston, as follows, viz.:

"My mission to Mobile, so far as the *Sunniva* is concerned, failed.

"Up to my leaving there on the 29th, the *Sunniva* had not arrived. I therefore declined to take her, as it would put the *Wilson* and *Sunniva* close together; and as I could only get the *Sunniva* up to the 30th (of August), Orr and Laubenhimer having an option on her, and would not say whether I could get her or not after September 1, I considered it best to look for another vessel, and have about concluded the charter of the *Hiram*," etc.

This letter fully explains the situation, and more clearly evidences an intentional abandonment of their contract with the plaintiff, because the defendants could not secure the lease of the *Sunniva* for September—their engagement being for the month of August only.

And these admissions of the defendants are in perfect harmony with the testimony of the plaintiff's witnesses.

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We are of opinion that plaintiffs have clearly made out their case and are entitled to recover of the defendants the full amount of their contract. For it is clearly proven, as well as admitted by the defendants, that the vessel was not deliverable under the original agreement until about the 30th of July, 1894; and the proof shows that she was being unloaded at the port of Mobile on the 29th of July, 1894, and was on that date tendered to the defendants and by them declined. And it is not established by the evidence that any subsequent change was made in the contract.

It is admitted by plaintiff that after the vessel had been tendered to the defendants and declined, that it put the vessel into service on their own account and operated her a part of the time, using an effort, as it had the right to do, to reduce defendants' damages to a minimum, but that said ventures resulted in a further loss. We do not regard that action as in any sense an acquiescence in defendants' violation of their contract. The judgment appealed from must be reversed.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled and reversed; and it is now ordered and decreed that the plaintiff do have and recover of and from the defendants, John Wilson & Co., and from the individual members thereof *in solido*, the sum of two thousand one hundred and eighty dollars and fifty cents, with legal interest from the 31st of July, 1894, and all costs of both courts.

ON APPLICATION FOR REHEARING.

Our attention has been called to the fact that our decree is directed against the defendants, John Wilson & Co., and the individual members thereof without enumerating them, and as their names appear of record, it has been suggested, on behalf of plaintiffs and appellants' counsel, that the decree be altered so as to conform thereto without granting a rehearing.

It is therefore ordered adjudged and decreed that our original decree be so amended as to read as follows, viz.:

It is therefore adjudged and decreed that the judgment appealed from be annulled and reversed, and it is further ordered and decreed that the plaintiffs and appellants do have and recover of and from the defendants, John Wilson & Co., and from the individual members thereof, viz.: Luigi Del 'Orto, the succession of

Oil Co. vs. Matheson.

John Wilson, Sr., deceased, and John Wilson, Jr., Virginia L. Wilson and Cora B. Wilson, executors of John Wilson, Sr., deceased, *in solido*, the sum of two thousand one hundred and eighty dollars and fifty-one cents, with legal interest from the 31st of July, 1894, and all costs of both courts.

It is finally ordered and decreed that as thus amended, our original decree remain undisturbed.

No. 12,029.

STANDARD COTTON SEED OIL COMPANY VS. PETER MATHESON.

A party having entered into a contract to furnish to another, at stated periods within a specified time, a given sum of money for the purpose of enabling the latter to purchase for the former cotton seed, the former has a right to look to them for the reimbursement of his outlay, as well as to rely upon them to recruit and operate his business.

In case the latter shall decline to carry his contract to completion, and threaten to dispose of the seed he has purchased in pursuance of his agreement, because the former declines to pay his drafts after he has already overdrawn his contract, this act comes within the purview of the law applicable to fraudulent intent as justifying an attachment.

A PPEAL from the Seventh Judicial District Court for the Parish of East Carroll. *Montgomery, J.*

Percy Roberts and Gus. A. Breaux for Plaintiff, Appellant.

Thorpe & Barber and Clifton F. Davis for Defendant, Appellee.

Argued and submitted January 25, 1896.

Opinion handed down February 10, 1896.

Rehearing granted April 20, 1896.

Argued and submitted on rehearing June 2, 1896.

Opinion handed down June 25, 1896.

ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

WATKINS, J. Defendant and appellee moves to dismiss the plaintiff's suspensive appeal, because the surety on the appeal bond, the American Surety Company, of New York, a foreign corporation, "is

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104	654
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108	373
108	374
48	1321
114	716
48	1321
120	1087

insufficient in law" because said company became surety under and by virtue of Act 41 of 1894, entitled "An act to authorize certain corporations to become sureties upon bonds," etc., and which is unconstitutional and void in certain particulars.

And said appellee moves to dismiss plaintiff's devolutive appeal, for the reason that the suspensive and devolutive appeals herein were perfected on the same date by two separate appeal bonds, and that appellants are without warrant in law to bring up in one transcript two appeals taken in the alternative.

The record shows that on the 20th of June, 1895, plaintiff's counsel, in open court, obtained from the judge an order of "suspensive and devolutive appeal" upon the plaintiff "giving bond as fixed by law for a suspensive appeal, and in the sum of one hundred dollars for the devolutive appeal."

Thereafter, the plaintiff furnished to the Clerk of the Court two separate bonds of appeal—one devolutive and the other suspensive—bearing same date of execution and approval, in exact conformity with the order of appeal.

We entertain no doubt of the validity of the two appeals, though granted in one order by the court—the judge having granted both the suspensive and devolutive appeals. It is of no consequence that the appellant executed, contemporaneously, two appeal bonds. It was the better practice to thus preserve the identity and duality of the appeal. The order of court is the foundation of the appeal. Only one transcript is necessary, there being but one decree. Succession of Touzanne, 86 An. 420.

On the second ground of the motion counsel's argument is, that, as matter of law, a corporation can not become surety on an appeal bond, not possessing the essential faculty of a judicial surety in the sense of the Code; and that the statute declaring a corporation to be a competent surety is unconstitutional and void, and that plaintiff's appeal must be dismissed for the want of a competent surety.

A judicial surety must possess the qualifications required by R. C. C. 3041—that is to say, he must be "a person able to contract." R. C. C. 3064.

The Code also declares "that a corporation is an intellectual body created by law," etc. R. C. C. 427.

"Corporations are intellectual beings different and distinct from all the persons who compose them." R. C. C. 485.

It declares further that "corporations legally established are substituted for persons * * * they can make valid contracts and obligate others, and obligate themselves toward others," etc. R. C. C. 438.

It does not readily appear that the Code, by the use of the term *persons*, has necessarily excluded *corporations* from the privilege of making a binding contract of suretyship, if the same be permitted by the terms of their charters.

With regard to the domicile of the judicial surety, the Code says:

"When surety is tendered of persons residing out of the parish, the judge alone shall pass on the sufficiency thereof," etc. R. C. C. 3042.

And it further declares that "all actions against the sureties aforesaid may be instituted in the court having original jurisdiction of the subject matter; and the parties thereto, when legally cited, shall be subject to the jurisdiction of such court." *Id.*

There is, therefore, no serious question as to the *domicile* of the surety, and none as to the *solvency*.

(a) The charge of unconstitutionality of the law is, that—

1. The object of the act being to amend the articles of the Code relative to the qualifications of sureties on judicial bonds, it contravenes Art. 29 of the Constitution, which declares that "every law * * * shall embrace but one object, and that be expressed in its title."

The title of the statute is as follows, viz.:

"An act to authorize certain corporations to become surety upon bonds required to be furnished by law," etc.

This title indicates that the statute following will make provision for certain corporations to become judicial sureties, and such provisions may operate as an amendment of the Civil Code in that respect; but we think the enactment of a statute, such as the title imports, comes clearly within the competency of the Legislature.

On the subject "of repeal of laws" the Code says:

"Laws may be repealed either entirely or partially by other laws" (R. C. C. 2).

"The repeal is either express or implied. It is express when it is literally declared by a subsequent law; it is implied when the law contains provisions contrary to or irreconcilable with those of the former law" (R. C. C. 28).

That is the apparent result of the enactment in question if, as the defendant's contention is, the Code precludes a corporation from becoming a judicial surety.

In our opinion the title of the act clearly states the object of the law.

(b) The second charge of unconstitutionality is that the act contravenes Art. 46 of the Constitution, in that it grants the privilege of becoming surety to certain kinds of corporations exclusively, and excludes all others therefrom; the argument of defendant's counsel being "that this is special legislation purporting to give exclusive privileges to a particular group of corporations, which are prohibited to all corporations not within that particular group."

Counsel, then, in the elaboration of the foregoing objection, submits:

"Moreover, Act 41 of 1894 especially grants to foreign guarantee corporations having no property within this State the capacity of suretyship, which is enjoyed neither by other corporations in the State nor by private citizens; even a home guarantee corporation is not admitted to suretyship unless it has on deposit with the State Auditor of Public Accounts assets worth one hundred thousand dollars, nor can private citizens be admitted to suretyship on legal bonds unless they have property within the State. Indeed, this statute attempts as rank a preference as did that of the California Legislature, referred to by Judge Cooley, which, under pretence of enacting a Sunday law, forbade bakers to bake bread on Sunday." Cooley's Const. Lim., 154 N.; *Ex parte Westerfield*, 55 Cal. 550; 36 Am. Rep. 47.

Article 46 of the Constitution declares that the General Assembly "shall not pass any local or special law" upon the following subjects; and one among the number is that of "granting to any corporation, association or individual, any special or exclusive right, privilege or immunity."

But the act in question is not a local or special law.

It declares "that hereafter any corporation duly incorporated under the laws of this or any other State of the United States for the purpose of transacting the business of guaranteeing the fidelity of persons holding places of public or private trust; guaranteeing the performance of contracts other than in insurance policies and executing and guaranteeing bonds, or undertakings required, or permitted in actions or proceedings by law allowed," etc.

It is a general law upon a particular subject and embraces corporations which have organized with a view to that subject.

This objection is not well grounded.

The next objection is that the statute contravenes the two hundred and thirty-fifth article of the Constitution, which provides that "the exercise of the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals or the general well being of the State."

The argument of counsel on this proposition is unique, but, in our conception, it is unsound.

We quote the following from their brief (pp. 9 and 10), to-wit:

"The police power of the State is an attribute of the widest reach, and all attempts to circumscribe it by definitions and *formulae* have failed. It embraces not only governmental acts which bear upon the lives, liberties, health and good order of the governed, but also all such as affect the value, security, availability and use of the property of individuals. An exercise of the power in this latter sense, or its legislative construction by enactment, which has the effect of permitting corporations to conduct their business in such a manner as to infringe the equal rights of individuals to the possession, security and utility of their property, is obnoxious to the article of the Constitution.

"A definitive judgment is undoubtedly property to him in whose favor it is given, as well as the availability, security and control of the judgment. It is the equal right of individuals to have this property protected and secured by the suretyship of a man or woman residing within the jurisdiction of the court granting the judgment and having sufficient property within the State, whenever the control and use and enforcement of the judgment are arrested by suspensive appeal (R. C. C., Art. 3042; C. P., Art. 575).

"The Act of 1894 permits guarantee corporations so to conduct their business as to infringe this equal right of individuals, since it admits them to legal suretyship, though they be neither men nor women, and they be neither domiciled in the State nor own property therein; and the individual whose judgment is arrested by such suretyship suffers an infringement of the equal rights of all individuals, in such circumstances, to the benefit of security domestic both as to person and property."

We fail to discover anything in the statute which trenches, or purports to trench, upon the police power of the State; nor is it clearly pointed out in what manner the statute permits the corporations therein mentioned to so conduct their business as to infringe the equal rights of other corporations or individuals.

We understand that the defendant and appellee, as well as every other litigant, has the right to require that a surety shall possess property situated within the State to satisfy the exigencies of the case; but the law does not require that he shall reside in any specified locality. For the moment the person who, or corporation which, becomes surety signs the judicial obligation, he submits himself to the jurisdiction of that court *pro hac vice*. R. C. C. 3042.

Hence there is no foundation for this charge of unconstitutionality of the law, in this respect.

We have examined the grounds of the motion to dismiss with care, and have reached the conclusion that they are not well taken.

Therefore the motion to dismiss appeal is overruled.

ON THE MERITS.

On the 7th of November, 1893, the plaintiff commenced proceedings by attachment, which was subsequently dissolved by the Judge of the District Court, because of certain supposed irregularities in the proceedings; but on appeal to this court that judgment was set aside, the attachment reinstated and the cause remanded for further proceedings.

Since the cause was remanded it was tried by a jury, who rendered a verdict in favor of the defendant for seven thousand five hundred and eighty-four dollars as actual damages sustained in the wrongful issuance of the writ, and they at the same time gave judgment in favor of the plaintiff for the sum of two thousand seven hundred and fifty-six dollars and twenty-three cents, thus giving the defendant judgment for an approximate balance of four thousand eight hundred and twenty-eight dollars and eleven cents over the amount given to the plaintiff.

From that judgment the plaintiff has appealed.

For a succinct statement of the case see case of same title, 47 An. 710.

Suit is brought on an open account for about the sum of two thousand nine hundred dollars, for cash advanced to the defendant.

and, as a collateral security for which, the defendant executed his promissory note for two thousand five hundred dollars, payable at a future date, and secured same by special mortgage.

The attachment proceeds upon the theory that the defendant had mortgaged, assigned or disposed of, or was about to mortgage, assign or dispose of his property, or some part thereof, with intent to defraud his creditors. The defendant having, in his motion to dissolve the attachment on technical grounds, reserved the right to have the attachment dissolved, in the alternative, because the affidavit was untrue, availed himself of that reservation when the cause was remanded, and, in his answer, set up the untruthfulness of the affidavit and claimed in a reconventional demand nine thousand three hundred and eighty-four dollars and forty cents actual damages, in addition to about four hundred dollars in the way of credits for partial payments made on account.

The two questions for consideration are: (1) Was the affidavit untrue when made? (2) If untrue in point of fact, to what amount has defendant been damaged?

In determining the truthfulness of plaintiff's affidavit, the main question is whether the defendant was guilty of fraud, either intended or accomplished, in the acts complained of as justifying a resort to the writ.

The record shows that on the 25th of April, 1893, the defendant executed his obligation in favor of the plaintiff, for and in consideration of an advance of two thousand five hundred dollars to be made by it, on his drafts aggregating five hundred dollars per month, binding himself to ship to the company "during the season of 1893-94, four hundred tons, and as much more of good sound cotton seed, as he could buy or control, this seed to be weighed at Lake Providence by clerk of steamboat, and credited to (him) at the market price," etc.

Defendant's contract further stipulates that "as security for the payment of this advance and the delivery" of cotton, he was to execute an act of mortgage on his ginhouse and contents, in the sum of two thousand five hundred dollars; and, in accordance with that contract, he did execute his note and mortgage for the sum of two thousand five hundred dollars, "for money advanced and to be advanced during the year 1893."

Plaintiff's account shows that an account was opened with the de-

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fendant by the payment of his draft for two hundred and fifty-nine dollars and forty-three cents, on the 1st of May, 1893; and that the cash advances were regularly continued, by the payment of similar drafts at similar dates, and of various amounts—the total amount aggregating two thousand nine hundred and eleven dollars and ninety-eight cents on the 25th of October, 1893, when the account was closed, and far in excess of the original amount agreed on.

It thus appears that the plaintiff fulfilled to the letter the terms of its contract, and even honored defendant's drafts beyond the amount agreed upon, notwithstanding there occurred in the summer of 1893 a great crevasse on the banks of the Mississippi river, in the immediate vicinity of Lake Providence, where the defendant lived, and where his purchases of cotton seed were to be made for the discharge of his contract, thus rendering performance difficult.

It also appears that in view of this situation, the plaintiff sent a representative to the defendant with the definite object of procuring the latter's consent to a cancellation of the agreement, upon his shipping enough seed to cover the amount then due; but this proposition the defendant declined—insisting on the continuance of advances.

Realizing that defendant was drawing long after cotton had commenced to open, and cotton seed was deliverable, under his contract, without any shipment having been made, plaintiff wired him to know upon what he predicated his drafts; and to this he made reply, "against cotton seed stored away in ginhouse." A witness for the plaintiff makes this statement on that subject, viz.:

"I was sent by the company to see (the defendant) because he telegraphed the company that certain drafts he was drawing, and for which he had no authority to draw (were drawn) against seed he had in his warehouse, as the company advanced him the full amount they agreed (to furnish), as per contract. I was instructed by the company to say that they would not pay the draft in question, but if he would ship cotton to cover drafts, and ship the seed he had on hand, they would help him further."

He further states, that he was directed to ascertain "why he was holding the seed, when it was understood he was to ship as the seed reached him from time to time during the season;" but the defendant "declined to give (him) any satisfactory information of what he intended doing."

That he made a demand upon him to comply with his contract " (and) ship the seed on hand (and) he refused, giving as his reason that it would occasion him an extra expense to haul the seed to the landing."

That defendant claimed to have on hand at the time about fourteen hundred sacks. That he examined them as best he could, but they were stored in such indifferent order he could not count them. That he requested defendant to allow him to examine his books, and he declined on the ground that they were not posted. That he proposed that he and defendant post the books, but this proposition was declined. That he then requested the defendant to allow him to see his gin book, so that he could estimate the quantity of seed he should have on hand, and that request was refused. The witness then stated that, from the appearance of what he saw, he supposed there were about a thousand sacks.

That the defendant said " he would ship (plaintiff) the seed when the boats could reach his warehouse, provided we continued to pay his drafts; but if these drafts were not honored and should be returned to him he would make them good by disposing of the seed on hand." That he "called his attention to the agreement and (the fact) that the company had more than fulfilled its part, and insisted on his shipping the seed on hand and stop talking about drafts he had no authority to draw."

That the defendant replied "that if the drafts were returned un-honored he would protect his friends from whom he had purchased the seed by selling sufficient seed to cover the drafts returned."

That he asked defendant for a bill of sale for the cotton seed on hand, and he had refused. That he requested of him an explanation of the expenditure of the money advanced by the plaintiff to him and to secure his agreements for the purchase of seed," and he gave none.

The witness states that on a previous occasion he visited the defendant with reference to the crevasse and urged him to ship seed to cover the balance then due and call the contract off; that he positively declined to do so, stating that "he could fulfil his part of the agreement notwithstanding the crevasse; that he was not held to Providence alone, and that he had funds at other points and could secure more seed than he had agreed to ship."

Being dissatisfied with the result of his interview, the witness made

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a formal written protest and delivered it to the defendant in person and placed the matter in the hands of an attorney and the attachment followed a few days afterward; the attorney having, in the meanwhile, interviewed the defendant and learned from him that he was engaged in preparing his seed for sale, and "was waiting for the seed boat of the Union Oil Company, which he expected down (the river) the following day;" also that plaintiff had quit paying his drafts and that was the reason he was going to sell his seed to the Union Oil Company.

On the contrary, the defendant, as a witness, denies that it was his intention to sell the seed to the Union Oil Company, but states that he expected to submit to the captain of the steamboat which was operating for that company a proposition in respect to the seed. That "he was simply repiling the seed so that (he) could see what he had and be able to show what he had." That he told Mr. Wyly, the attorney of the plaintiff, that he felt satisfied that (he) could make arrangements to pay the Standard Oil Company what he owed them and go ahead in the business for another company."

While the defendant claims that he had on hand at the time eighty tons of seed, yet the sheriff's return discloses that only about seventy tons were taken under the writ of attachment, and the value of same was only six hundred and twenty-two dollars and ninety-five cents.

Defendant's counsel point out the fact, that at the time of the attachment his mortgage note had not become due, and did not become due until the 31st of December, 1893; and that, consequently, plaintiff was well secured, and the stipulation of the contract was that defendant should ship the seed during the season of 1893-94, which had only been open for a short time, and was at the time of seizure practically suspended.

This explanation is, to our minds, unsatisfactory. The plaintiff's suit is upon account, as the primary evidence of the defendant's indebtedness. The note and mortgage were only collateral security therefor. The company was engaged in the business of compressing oil from cotton seed. The contract with the defendant was entered into for the specific object of obtaining cotton seed for the purposes of their business. For that purpose they had agreed to advance money to the defendant to enable him to purchase seed and ship same to them. When purchased and stored the seed constituted a quasi pledge for the defendant's indebtedness; and he had procured

the advances of money with the specific promise in writing to ship same to plaintiff. The plaintiff's money had been presumably invested in the seed, and it had a right to rely upon them as security for the reimbursement of their outlay.

Looking at the result of the enterprise, the plaintiffs were in the attitude of having advanced two thousand and nine hundred dollars in cash, and received nothing in return; and that of the defendant was of having received that sum, and having on hand at date of seizure only six hundred dollars' worth of seed.

In the light of these facts, the defendant's response to the plaintiff's telegram making inquiry as to what he predicated his drafts upon, wants confirmation; and these facts place the defendant in the equivocal attitude of having either misstated the facts in his answer, or of having disposed of a large part of the seed in the interim between the statement and the seizure. But be that as it may, the defendant declined to make any satisfactory arrangement of the matter with the plaintiff's agent or attorney, notwithstanding he was pressed and importuned to do so. On the contrary, he distinctly stated to them that he did not intend to pay the plaintiff anything or ship it any seed, unless it continued to pay his drafts—
notwithstanding he had largely overdrawn his contract at the time.

It is quite true that the defendant did ship to the plaintiff some bales of cotton, the proceeds whereof so diminished his account as to leave only the sum of one hundred and eighty-eight dollars and thirty-three cents in excess of his two thousand five hundred dollar note; but that shipment was subsequent to the attachment, and exercises no bearing on the question of fraud. That can be viewed only in the light of an afterthought; and it is also significant that just prior to this shipment, the defendant drew on plaintiff several other drafts.

It must be borne in mind, that at the time of the interview that plaintiff's agent had with the defendant, which is declared in the testimony *supra*, it is clearly shown that the Mississippi river was navigable at Lake Providence, as the steamboat belonging to the Union Oil Company was due and expected on the following day, and defendant expected to make a deal with her captain in respect to the seed which were subsequently attached.

We are of opinion that the views we expressed in the case of *Shingle and Lumber Company vs. Lorio*, 46 An. 441, are strictly applicable and should govern this case.

In that case we said:

"Plaintiffs have, on the other hand, up to date paid out the money and advanced the supplies mentioned, and not only have not received anything by way of return, but are confronted with a large claim for damages.

"We have examined the record with great care to see whether this unequal condition of affairs was brought about by the conduct of the plaintiffs themselves. * * * It suffices to say that, in our opinion, defendant's complaints are not only without merit, but, on the contrary, his course has been unjustifiable and his demand unreasonable.

"There is nothing in the contract to warrant defendant in the pretension that the plaintiffs were to continue to furnish him with money and supplies," etc.

It is conceded, that, in order to justify a resort to an attachment under the statute relied upon, it is a condition precedent that the defendant must have been guilty of fraud in the sale, or attempted alienation of his property, to the prejudice of his creditors; but we think the facts we have related clearly evidence such a fraudulent intent within the meaning of that statute, and that the plaintiff was entitled to resort to the remedy by attachment.

Entertaining these views, the judgment appealed from must be so amended as to conform thereto.

It is therefore ordered and decreed that the judgment appealed from be so amended as to reject and disallow the defendant's demands *in toto*, except as to the credit he is allowed for the proceeds of cotton delivered to the plaintiff.

It is further ordered and decreed that the judgment dissolving plaintiff's attachment be set aside, the writ of attachment and the seizure under it be revived, and, as revived, that same be maintained and enforced on the property attached, and that the privilege of plaintiff as attaching creditor be recognized and enforced upon the property attached.

It is finally ordered and decreed that the judgment be, in all other respects, affirmed, and that the defendant be taxed with the costs of both courts.

ON REHEARING.

No objection is made in the application to the opinion in so far as it appertains to the appellee's motion to dismiss, but it rests mainly

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upon the proposition that it is inconsistent with that rendered in the case of Winter vs. Davis, decided on the same day, wherein we affirmed a judgment dissolving an attachment.

Our opinion is predicated upon the stipulations of the following written contract, viz.:

“LAKE PROVIDENCE, La., April 25, 1893.

“For and in consideration of an advance of twenty-five hundred dollars made by the Standard Cotton Seed Oil Company, of New Orleans, this advance to be paid by honoring drafts to the amount of five hundred dollars per month, I bind myself and agree to ship to the said Standard Cotton Seed Oil Company during the season of 1893-94 four hundred tons and as much more of good, sound cotton seed as I can buy or control, this seed to be weighed on landing at Lake Providence by clerk of steamboat, and credited to me at the market price and one dollar per ton commission.

“As security for the payment of this advance and the delivery of the four hundred tons of good, sound seed, I will execute a mortgage on the ginhouse and contents, and transfer the insurance to the Standard Cotton Seed Oil Company. I also agree to give and take interest at the rate of eight per cent. per annum; that is, I will pay interest on the money from date until payment, and I am to be credited with interest on all shipments of seed. This signed in duplicate.

“(Signed)

PETER MATHESON.

“Witnesses:

“(Signed) A. B. JOHNSTON.

“W. E. POWERS.”

To this contract, the obligor, Matheson, gave his note and mortgage for twenty-five hundred dollars as collateral security.

The suit is brought upon an open account for about two thousand nine hundred dollars, money advanced under the foregoing contract—embracing overdrafts to the amount of about four hundred dollars.

The consideration of said engagement on the part plaintiff was that the defendant *should ship* to them “during the season of 1893-94 four hundred tons, and as much more of good cotton seed as (he) can buy or control; this seed to be weighed on landing at Lake Provi-

dence by clerk of steamboat, and credited to (him) at the market price," etc.

To re-enforce this stipulation the contract further provides, that "*as security for the payment of this advance, and the delivery of the four hundred tons of good cotton seed,*" Matheson agreed to execute a mortgage in favor of the oil company.

Our opinion finds, as a fact, that the oil company not only advanced to the defendant the whole amount of twenty-five hundred dollars in cash on his drafts, without question, but that they advanced to him four hundred dollars more. That these advances were kept up continuously from the date of the contract to the 25th of October of the same year; and during that period of time not a single pound of cotton seed was shipped by the defendant to the company.

That, realizing that defendant was drawing long after cotton had commenced to open, and cotton seed was deliverable under their contract, without any shipment having been made, plaintiff wired to defendant to ascertain upon what he predicated his drafts, to which he replied, "*against cotton seed stored in my ginhouse.*"

That soon afterward plaintiffs sent a representative to Lake Providence to see the defendant and ascertain the facts, and, if possible, to obtain a settlement of their account.

That representative was particularly directed to ascertain "*why (the defendant) was holding the seed, when it was understood he was to ship as the seed reached him from time to time during the season.*"

That in pursuance of those instructions, said representative called on the defendant and "*made demand upon him that he comply with his contract and ship the seed he had on hand; and he refused, giving as his reason that it would occasion him extra expense to haul the seed to the landing,*" and further stating that "*he would ship when the boats could reach his warehouse, provided (the company) continued to pay his drafts; but if these drafts were not honored and should be returned to him, he would make them good by disposing of the seed he had on hand.*"

That he requested of the defendant an explanation of the expenditure of the money which the oil company had furnished him, and he declined to give any.

That immediately after said interview it was discovered that the defendant was preparing his cotton seed for sale, and was actually

waiting for the arrival of the seed boat of the Union Oil Company—a competing organization of the plaintiff—which was expected down the river the following day.

Our opinion finds, as a fact, that instead of defendant having accumulated *four hundred tons* of cotton seed, as stipulated in the contract, he had on hand, at date of the seizure under the attachment, only about *seventy tons*, worth six hundred and twenty-two dollars and ninety-five cents, notwithstanding he had received and consumed over twenty-nine hundred dollars of the plaintiffs' money without making any shipments to them in the meanwhile.

It finds further that the company was engaged in the business of compressing oil from cotton seed, and that the contract with the defendant was entered into for the express object of obtaining cotton seed for the purposes and uses of its business. That it was for that express purpose it had agreed to and did furnish defendant with money to enable him to purchase seed and ship same to them. That when purchased and stored the seed constituted a *quasi* pledge for defendant's indebtedness; and that plaintiffs' money having been invested in the seed, presumably, it had a right to rely upon same as security for its outlay.

That, looking at the result of the enterprise, plaintiffs were in the attitude of having advanced twenty-nine hundred dollars in cash, and received no return therefor.

Our opinion concludes with this statement, viz.:

"In the light of these facts, the defendant's response to the plaintiffs' telegram, making inquiry as to what he predicated his drafts upon, wants confirmation; and these facts place the defendant in the equivocal attitude of having either misstated the facts in his answer, or of having disposed of a large part of the seed in the *interim* between the statement and the seizure.

"But, be that as it may, the defendant declined to make any satisfactory arrangement of the matter with plaintiffs' agent or attorney, notwithstanding he was pressed and importuned to do so. On the contrary, he distinctly stated to them that he did not intend to pay the plaintiffs anything or to ship any seed, unless and until they paid his drafts, notwithstanding he had largely overdrawn his contract at the time," and had shipped them no seed.

And now we are for the first time confronted with the following statement, which appears to be wholly at variance with the terms of

the written agreements as well as all the proven facts in the case. It is as follows, viz.:

"There was no stipulation to buy seed for the plaintiff; plainly, every pound of seed which defendant should ship to plaintiff was to be his own and credited to him at market prices ruling at the date of shipment. The advances were not stipulated to be for the purpose of enabling defendant to purchase cotton seed, nor could such have been the intent of the parties, for the contract expressly provided for the advancing of the entire sum before the season of ginning and consequently before any seed could be purchased. The plain meaning of the agreement was that the money was loaned to defendant for his general convenience, and in consideration of its use he was to return it with interest, and additionally sell his cotton to the plaintiff at one dollar per ton above the market price." Defendant's brief on application for rehearing, page 8.

On the contrary, the agreement declares that the defendant "in consideration of an *advance* of twenty-five hundred dollars * * * binds himself and agrees to ship to the (oil company) four hundred tons of cotton seed;" and "as security for the payment of this advance and the *delivery of four hundred tons of good, sound seed*," he obligated himself to execute his mortgage.

Have these plain and unambiguous stipulations of the defendant's written contract anything like the significance, "that the money was loaned to defendant for his general convenience?"

Quite the contrary.

Yet that statement was necessary for the purposes of this application, and to fortify the defendant's contention that plaintiffs were amply secured by the mortgage.

But the mortgage was but an incident of the transaction, and only a collateral security for the advances of money plaintiffs made.

Let us contrast the facts thus related, and not denied, with those of the case of *Winter vs. Davis*.

We make the following extracts therefrom, as they appear quoted in brief of defendant, on this application, viz.:

"In the case of *William Winter vs. Nitore H. Davis* (No. 12,024), decided by your Honors on the same day as the instant case, the agreement between plaintiff and defendant was embodied in a letter and expressed in these words:

"I do not hesitate to say that I will ship you at least twenty-five

hundred bales of cotton, provided you will render me the necessary financial aid. I agree to pay you fifty cents commission on each bale you sell for me, and will further agree not to ship cotton elsewhere, or to sell a single bale in this market, but will ship every bale to you."

Upon this basis the plaintiff advanced large amounts to defendant. The court found upon the evidence that defendant paid other debts than plaintiffs, made a dation to his wife, and actually sold to another party thirty bales of cotton, and received the price.

Upon these facts the court, MR. JUSTICE BREAUX being its organ, said:

"It is further urged by the plaintiff that the defendant was under obligation to buy cotton and ship it to him; that throughout September and to the 7th day of October, 1898, he seemed to have shipped to him, Winter, in accordance with the contract; that on the 7th of October he, despite the contract, shipped about thirty bales of cotton to others than plaintiff, and received the money therefor.

"The advances, as we understand, were not made for the sole purpose of buying cotton. They were made to aid the defendant in his business. He, as an inducement, promised to ship cotton to the plaintiff, which the latter was to sell and pay himself from the proceeds.

"There was a breach of contract, a failure to comply with an obligation, not of such a character, however, as to justify an attachment."

In that case defendant complied with his contract to ship plaintiff twenty-five hundred bales of cotton, and shipped cotton to him during the month of September and part of October; but on the 7th of the latter month, he shipped about thirty bales to other parties, and received the money therefor. But plaintiff's advances were not made for the sole purpose of enabling defendant to buy cotton. They were made to aid him in his business; and "he, as an inducement, promised to ship cotton to the plaintiff, which the latter was to sell and pay himself from the proceeds."

The two cases are altogether dissimilar as to their facts.

The oil company was not engaged in the business of a factor, commission merchant or money lender; nor was the defendant engaged in business as a retail country merchant. Their

relations are specifically set out and defined in a written contract; thereunder the oil company had not only fully performed its engagement and more, but the defendant had failed and refused to perform his engagement in any respect. Thereunder the defendant had placed himself under definite obligation to purchase, control and ship cotton seed to the plaintiffs for a specific purpose. In pursuance thereof the oil company furnished all the money they had agreed to advance the defendant and more; but defendant failed altogether to comply with his contract, except upon the condition that the oil company would continue to pay his drafts without limit, and beyond the terms of its engagement—notwithstanding he had already overdrawn his limit by four hundred dollars. Not only so, but defendant openly declared to a representative of the oil company, that if his condition was not complied with, he would sell the cotton seed he had then on store—and on the faith of which he had drawn his overdrafts and proposed to draw others—to a competing cotton oil company. And upon the following day—or within a day or two at furthest—the defendant's cotton seed, aforesaid, was discovered on the river bank preparatory to delivery to the seed boat of the Union Oil Company, which was expected to pass down the river on the next day.

The oil company's representative, finding the defendant determined to put it at defiance, gave him a written protest, and placed the matter in the hands of a local attorney. The attorney examined into the situation of affairs, and, finding them as they had been reported to him, he at once procured the attachment of the defendant's property.

Under this state of facts can it be affirmed that Matheson was about to assign or dispose of his property, or some part thereof, with intent to defraud his creditors within the meaning of Code of Practice, Art. 240, par. 4?

In *Herman vs. Amedee*, 30 An. 394, it was held that the fraudulent intent necessary to support an attachment is not shown by the mere fact that a merchant is selling and paying off his debts, including that of plaintiff. That was defendant's situation in *Winter vs. Davis*.

Very much the same may be said of the principle which was announced in *Hernsheim vs. Levy*, 32 An. 340.

In *Lehman vs. McFarland*, 35 An. 624, it was held that an attach-

ment could not be sustained when the "proposed disposition of their property by the defendants was in the interest of their creditors, whom they proposed to place on a footing of equality and fairness," etc.

In *Wetherow vs. Croslin*, 24 An. 128, the court sustained an attachment on the faith of defendant's statement "that he owed the plaintiff some money and was unable to pay them at the time; that they were going to sue him, and he wanted to keep his property, but wanted to pay them."

In *Boyd vs. Labranche*, 35 An. 285, the court sustained an attachment on the ground that plaintiff had good reason to believe that defendant was about to dispose of his property to defraud his creditors, and said:

"Promptness of action was the one thing needful. Plaintiff was not required to wait until events had shown what defendant really intended to do. They acted on the state of facts as they existed at the moment," etc.

In *Stephens vs. Helpman*, 29 An. 635, the court justified an attachment on the ground that the defendant had given an unfair preference to some of his creditors, and had made representations to the plaintiff, upon which he acted.

In *Newman vs. Kram*, 34 An. 910, the court sustained an attachment on the ground that the defendant had made threats that he would dispose of his property to protect himself, if he was sued.

It is in proof that plaintiffs wired defendant to ascertain upon what he predicated his overdrafts, and that his response was upon cotton seed stored in his ginhouse; whereas, in fact, defendant either misrepresented his real situation, or he fraudulently disposed of a large part of his cotton seed subsequently.

This statement was at first made to influence the plaintiffs to continue to honor his overdrafts, in the expectation of being reimbursed from cotton seed in store; and, failing in the accomplishment of this design, defendant threatened to sell his seed to a rival company, if plaintiffs declined to pay his overdrafts in the future.

These facts fulfil all the requirements of the *Stephens* and *Newman* cases.

The phrase intent to defraud finds an excellent interpretation in *Chaffe, Powell & West vs. Gill*, 43 An. 1053, in which we held that, as the property of the debtor is the common pledge of his creditor,

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every act done by the debtor with the intent of depriving his creditor of the eventual right he has upon the property of such debtor is illegal." Sustaining an attachment. R. C. C. 1868.

The instant case presents an even more forcible illustration of that principle, in that the defendant had contracted to purchase, control and ship to plaintiffs the cotton seed he had stored in his ginhouse, and upon which his overdrafts had been drawn; and his openly declared intention to sell them, if plaintiffs refused to pay his *future* overdrafts, was not only a violation of his contract, but an attempt to deprive them of property which was stored for their account, and was a security for the advances they had already made to defendant on the faith of it.

Manifestly these transactions evidence an intent to defraud.

For the foregoing reasons our original opinion and decree are maintained.

No. 12,015.

JACOB MARX VS. HIS CREDITORS.

A charge of fraud preferred against an insolvent, under Sec. 1804 of the Revised Statutes, is prescribed by the lapse of twelve months antecedent to the filing of his schedules under order of court.

The insolvent laws of this State provide a purely domestic remedy, which can be availed of only by resident creditors, and those domiciled outside of the State who come into our courts and submit themselves to their jurisdiction, by accepting the surrender by proving their debts at a general meeting of the creditors.

It is of the essence of a charge of fraud under the aforesaid section of the statutes that the opposition should allege and the evidence prove an intention on the part of the insolvent to defraud, and injury resulting therefrom to the complaining creditor.

A PPEAL from the Third Judicial District Court for the Parish of Union. *Barksdale, J.*

Gunby & Sholars for Plaintiff, Appellant.

Everett & Thomas for Defendants, Appellees.

Argued and submitted June 3, 1896.

Opinion handed down June 22, 1896.

Marx vs. His Creditors.

The opinion of the court was delivered by

WATKINS, J. The plaintiff is appellant from a judgment sustaining an opposition to the homologation of the proceedings and deliberation of a meeting of his creditors, appointing a definitive syndic, and to the appointment of Mose Haas to be definitive syndic.

The opposition was made by Stern, Lauer, Scholl & Co., of Cincinnati, Ohio, and Rothschild Bros., of St. Louis, Missouri, creditors of the plaintiff, and Edward Everett, provisional syndic—the first named having an ordinary, unsecured claim for one thousand four hundred and seventy-six dollars and twenty-five cents, and the second one for five hundred and twenty-four dollars and sixteen cents.

The judgment appealed from is predicated upon the verdict of a jury finding the plaintiff “guilty of fraud in conferring an unlawful preference and advantage upon another *bona fide* creditor,” and it adjudges and sentences him “to imprisonment in the parish jail in Farmersville, Union Parish, La., for the period of nine months.”

But this decree is coupled with the *proviso* that the insolvent may be “released from imprisonment by paying the complaining creditors, Stern, Lauer, Scholl & Co. and Rothschild Bros., the amount of their debts against him; or by his paying and repairing the amount of injury and fraud done to them, and which is complained of by them, which amount may be fixed by the said Jacob Marx in a proceeding to be had contradictorily with the said complaining creditors, as may be determined by this court.”

It appears that the syndic's appointment is not dealt with or disposed of in the foregoing decree, and need not therefore be referred to; and, aside from the various averments in reference to the manner in which proof of the insolvent's debts was made, and the authority of the persons representing the creditors at the meeting of creditors, the allegations of opponents charging specific acts of fraud against the insolvent are few, and same are embraced in the following extract from the brief of his counsel which we have verified, viz.:

“Opponents aver that Jacob Marx has been guilty of divers acts of fraud during the past three years. That he has shown unfair and undue preference to J. Weiss & Co., A. Adler & Co., Wm. Adler & Co., B. Landauer & Co., Horter & Rice; and has paid some of his creditors in full. That said Marx borrowed money from Weiss & Co., and pledged his individual note for same, which was the com-

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mon pledge of his creditors, and placed said funds in a new business in Monroe, La., known as the Marx Company, Limited, but placed his stock in the name of his father-in-law, M. Levy, of Mississippi. That he has collected about five thousand dollars on notes and accounts that he owned when he applied for a respite, in April, 1892; that he has sold about two thousand dollars' worth of his notes and accounts, and admits he now owns thirteen thousand dollars less than he owned two years ago, and yet has not paid his foreign creditors, whose debts aggregated nine thousand dollars, except one or two whom he preferred and paid in full in the last twelve months, to-wit: The Simon T. Gregory Company, of St. Louis, for three hundred dollars."

Immediately succeeding this specific charge, the allegation is made that the insolvent had been guilty, during previous years, of various acts of fraud, in the preparation of his schedules, preparatory to obtaining a respite, alleging "that for all of said acts of fraud herein set forth Jacob Marx should be imprisoned according to law and a jury should be summoned to try the same."

The prayer of opponents corresponds with their averments.

The attorneys for the insolvent attract our attention to several objections of substance apparent upon the face of the papers, and upon them they confidently rely for the reversal of the judgment and verdict of the jury.

They may be summarized as follows, viz.:

First—The prescription of twelve months prior to the cession, against the charges of fraud.

Second—That the creditors opposing the cession, on allegations of fraud, have no standing in court, because they are foreigners, not domiciled within the State of Louisiana, and who have not accepted the surrender of the insolvent under the insolvent laws of the State of Louisiana, and are, consequently, in no way bound thereby.

Third—That opponents have not alleged that the insolvent did any act with intent to defraud his creditors, or that they, as creditors of his, had been injured by the acts complained of.

Fourth—That the opposition is radically defective in not specifying the dates, character and extent of the fraudulent preferences which are complained of.

In limine, the attorneys for the insolvent tendered a plea of no cause of action, the want of jurisdiction *ratione materiæ* and the prescriptions of ten days and twelve months.

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The last was, by the judge *a quo*, "referred to the merits to be tried by the jury," and the other pleas were overruled.

Upon the finding of the jury, and the rendition of judgment, the attorneys made an extended application for a new trial, which was refused.

In the first place, we think it was manifestly the duty of the judge *a quo* to have passed upon and decided the applicability of the plea of twelve months prescription, as a question of law, which necessarily determined the admissibility of a great deal of the evidence which has swelled the transcript to unusual proportions.

To illustrate: The opening sentence of the opposition is "that Jacob Marx has been guilty of divers acts of fraud during the past three years," whereas the insolvent made his application for a respite on the 1st of April, 1892, and the meeting of his creditors, which is the foundation of this opposition, was not filed until the 17th of October, 1894; and the opposition itself came at a later date.

A simple inspection of the statute under which this opposition was filed shows that the prescriptible period begins to run from a date twelve months prior to the date upon which the insolvent's surrender is made, for the language of the same is:

"If a debtor, who has voluntarily surrendered his property to his creditors, or has been proceeded against for a surrender, shall have given *within the year* an unjust advantage or preference to any one or more of his creditors," etc. Rev. Stat., Sec. 1804.

On the second proposition it appears to be evident that our insolvent laws provide a purely domestic remedy which can be availed of only by domestic creditors, or those domiciled outside of the State, *provided* they come into our courts and submit themselves to its jurisdiction by accepting the surrender by proving their debts at a general meeting of creditors. For it can not be seriously insisted that foreign creditors who have declined, or failed to accept a debtor's cession, may come into our courts for the sole purpose of enforcing against the insolvent the penalties of the law, while yet withholding an acceptance thereof, which might bind them in the future, by a final discharge through the votes of *resident* creditors.

But on the third proposition the case is just as clearly against opponents; for upon a most careful analysis of the sections of the insolvent law upon which this opposition is founded, and the decisions of this court defining them, we held that the gravamen of the charge

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is the *intention* on the part of the insolvent to defraud and injury to the complainant resulting therefrom. *Burdeau vs. His Creditors*, 44 An. 11; *Vide Campbell vs. His Creditors*, 16 La. 348; *Montilly vs. Creditors*, 18 La. 383; *Slocomb vs. Real Estate Bank*, 2 Rob. 92.

The following extracts from our opinion in the principal case will suffice, viz.:

"Whether the insolvent be guilty of fraud or not under this section is in the first place dependent on the question of fact as to the insolvent's commission of the reprobated act, and in the second place on the fact of his having successfully rebutted the legal presumption of guilty intent raised on the proof of the act. But in order to determine the main question, the insolvent's guilt of fraud under and in contemplation of the sections of the Revised Statutes we have quoted, we are first to ascertain whether as a matter of fact *Burdeau* did give within the year an unjust advantage or preference to any one or more of his creditors by payment or otherwise, the effect of which was to injure the complaining creditor."

* * * * *

And upon referring to the foregoing decision, we say: "Those decisions conform strictly to the precise wording of the statute; for it declares not only that the act complained of must have conferred or have been intended to confer on some of the creditors of the insolvent an unjust preference or advantage over the creditor who charges fraud, but it also declares that the effect thereof shall be to injure him."

Upon a consideration of all of the foregoing objections to the timeliness and sufficiency of charges and proof, we are of the opinion that the case should have been decided in favor of the insolvent.

It is therefore ordered, adjudged and decreed that the verdict of the jury and the sentence of imprisonment and judgment thereon pronounced be annulled and reversed; and it is further ordered and decreed that the insolvent be released from custody, and the demands of opponents rejected at their cost in both courts.

Cameron vs. Godchaux.

No. 12,108.

THE PLANTERS WELL COMPANY, LIMITED, VS. BODENHEIMER & BRO.

This case involves only questions of fact. The judgment of the District Court was reviewed and the case remanded.

A PPEAL from the Seventeenth Judicial District Court for the Parish of St. Mary. *Allen, J.*

Clegg & Quintero for Plaintiffs, Appellees.

P. H. Mentz for Defendants, Appellants.

The opinion of the court was delivered by McENERY, J.

No. 12,124.

WILLIAM CAMERON VS. LEON GODCHAUX.

The court, under Art. 303 of the Code of Practice, is entrusted with discretion in the matter of granting or refusing an injunction, and it therefore does not follow from the fact that an injunction was granted that the court was without authority to grant a motion allowing dissolution on bond.

Possession was not sufficiently shown on the face of the papers, and it in consequence is not evident that the court's ruling, permitting the bonding of the injunction, was erroneous.

The allegation that the injunction will cause irreparable injury will not take away from the judge all discretion to dissolve it on bond.

The damages are not irreparable.

The dissolution of an injunction, upon defendant giving bond, is a matter largely resting in the sound discretion of the court of the first instance, having power of compelling parties to reasonably speed the cause and to prevent losses sometimes occasioned by delay, in quieting the possession on the merits of one entitled to possession.

A PPEAL from the Eighteenth Judicial District Court for the Parish of Lafourche. *Caillouet, J.*

Howell & Martin and *L. F. Suthon* for Plaintiff, Appellant.

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Cameron vs. Godechaux.

Lazarus, Moore & Luce, Clay Knobloch & Son and Beattie & Beattie
for Defendant, Appellee.

Argued and submitted May 21, 1896.

Opinion handed down June 1, 1896.

Rehearing refused June 25, 1896.

The opinion of the court was delivered by

BREAUX, J. The plaintiff brought suit to be quieted in the possession of lands he describes in his petition, of which he says he has been violently and fraudulently dispossessed by the defendant.

A writ of injunction was granted to him as auxiliary to the principal relief sought.

The defendant, on motion, applied to be allowed to bond the injunction.

The motion was granted, save as to certain unimportant exceptions.

An appeal was granted to the plaintiff from the order to bond the injunction.

The plaintiff had not been twelve months in possession on the day of the alleged disturbance of his possession.

The character of the disturbance, though within a year after the plaintiff had gone into possession of the property, stamps the action he urges, under Art. 49 of the Code of Practice, as possessory.

In his motion to be permitted to bond, the defendant alleged that he had been in the open and peaceable possession of the property he describes, and was cultivating the land without opposition from the plaintiff.

It may be premised that none of the substantial rights of plaintiff or defendant are here involved. Whatever may be our decision the title remains unaffected. The claim of the plaintiff that he had an absolute right to the injunction demands a passing notice.

The injunction was not issued under those articles of the Code of Practice construed in several cases (in regard to which we at this time express no opinion, as it is not necessary in deciding the case) as securing, as a matter of right, an injunction upon affidavit and required bond.

The injunction issued under Art. 308 of the Code of Practice, in

which are the words: "may grant injunctions" in matter of the court's authority, different from the words in the other articles mandatory in terms.

As the asserted mandatory law, Art. 298 of the Code of Practice, invoked by the counsel for plaintiff, does not apply, we think that this disposes of the proposition, that the law being mandatory, injunction must issue and remain without a dissolving bond. We have seen that Art. 303 is not mandatory.

It devolves upon us at this time to determine whether the grounds were sufficient to authorize the court to grant the order, allowing the defendant to bond the injunction.

The nature and extent of the possession are not plain on the face of the papers.

The evidence in aid of the pleadings hereafter may show all that is required to sustain possession. In the present condition of the case it is not possible with any degree of certainty to determine the entire area of land of which the plaintiff had possession.

We do not wish to be understood as questioning in the least the sincerity of plaintiff, in alleging that he was in possession. It may be that he was in possession, and that the evidence will abundantly prove the fact. At this period of the litigation we do not think that the possession claimed is established.

Evidence is necessary to show possession. It is undetermined, at this time, and undeterminable.

In the cases to which our attention has been directed, possession was virtually admitted. There was a manifest intention to divest the one in possession, and it was evident that the divestiture would have been attended with injury irreparable in character.

In the case under consideration there is uncertainty as to the possession of the property.

The damages, in case it be decided that plaintiff is entitled to possession, are all provable and can be compensated in dollars and cents. The delay can be, at most, of a few months, and in the meantime there is a bond conditioned for the delivery of the property in the same condition as when the injunction issued, and for the payment of all damages the plaintiff suffers.

The plaintiff himself has fixed a value upon the injury alleged which the bond is intended to cover, if it be as alleged.

The temporary suspension of the sales of town lots and the pos-

State ex rel. Keplinger and Enderlee vs. Justice.

session for a time of land may, if without right, cause a loss, not, however, irreparable. Although the plaintiff alleges and sincerely thinks that the loss is irreparable, the court is not concluded by the sworn averment. Crescent City Live Stock Landing and Slaughterhouse Company vs. Police Jury, 82 An. 1192, 1197.

We are loath to disturb the action of the District Court in thus having granted the motion to dissolve on bond. The matter of needful delay, prior to trial on the merits and other circumstances, were peculiarly within his knowledge.

His judgment, in this view, it entitled to consideration.

It is affirmed at appellant's costs.

No. 12,165.

STATE EX REL. KEPLINGER AND ENDERLEE VS. OCTAVE PEREZ,
JUSTICE OF PEACE FOR SECOND WARD ST. BERNARD PARISH.

In an appealable case the writ of prohibition is not the remedy.

The writ of *certiorari* (not in aid of appellate jurisdiction) is not the remedy to have reviewed appealable issues.

The functions of the two writs are not enlarged when combined in one application for their issuance.

ON APPLICATION for Writs of *Certiorari* and Prohibition.

H. L. Garland for Relators.

Respondent in *propria persona*.

Submitted on briefs May 6, 1896.

Opinion handed down May 18, 1896.

The opinion of the court was delivered by

BREAUX, J. This is an application for writs of *certiorari* and prohibition.

The relators are defendants in a suit brought against them by J. Goucher *et al*.

The amount claimed is ninety-eight dollars.

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State ex rel. Keplinger and Enderlee vs. Justice.

In the magistrate's court the defendants objected to going on with the trial, at the time and place, for the reason that the court was being held and the case heard outside of the territorial limits of the justice presiding; also for the reason that the defendants are not residents of the parish.

The agreed statement of facts shows that the court sat at the stock landing, a place not within the ward of which the respondent is the magistrate. The exception interposed by the defendant was overruled.

Upon this state of facts the relators base their application for the writs of *certiorari* and prohibition.

The respondent sets forth in the answer to the order *nisi* that there is no court house or convenient place for holding court in his, the second ward; further, that for the convenience of all concerned the court is held at the place where it has been held many years.

The respondent also pleads a waiver of the objection by relators' alleged prior plea.

Lastly; the respondent urges that the relators have a remedy by appeal to the District Court, and consequently no remedy directly by *certiorari* and prohibition to the magistrate's court.

It admits of no question: courts must hold their sessions within the territorial limits fixed by statute, and magistrates can cite before them in civil suits, in so far as relates to a personal judgment, only those who reside in the ward.

On the other hand, one may waive these requirements or sanction the proceedings; the exception being *ratione personarum*.

These issues under our jurisprudence we would not be justified in deciding, in the proceedings before us, as the relator has ample remedy by appeal.

Our review of the authorities upon the subject has not resulted in our finding decisions under which the order applied for can be granted.

As to prohibition, without the *certiorari*, this court held in State ex rel. Follet vs. Judge, 82 An. 1182, that the relator's right was by appeal; the case was appealable.

The ruling was the same in State ex rel. Hernandez vs. Monroe, 83 An. 928.

On an application for a writ of *certiorari* against a defendant justice of the peace, this court held that in an *unappealable case*, under its

Oil Co. vs. Assessor et al.

supervisory jurisdiction it would entertain the writ for the purpose of inquiring into the validity of the proceedings. *State ex rel Montague vs. Louis Coquillon*, 35 An. 1101.

In a recent case the question was considered and the court reiterated the conclusion previously reached; holding that the relator had other relief, and therefore was without right to apply for prohibition. *State ex rel. Shaw vs. Judge*, 47 An. 1608.

Our views are not antithetic to, but, on the contrary, are consistent with those expressed in *State ex rel. Waller vs. Justice of the Peace*, 47 An. 27. The action of nullity, it was held, in the cited case, does not prevent granting the application in an *unappealable* case.

The writs here are applied for under the supervisory jurisdiction of this court.

Whether prohibition and *certiorari* be considered separately, or in one application for both writs, as in this case, this court has uniformly held that there is no ground for the application when the case is appealable. The facts being as here stated; if questions of jurisdiction be illegally decided originally, or on appeal, by a court from which no appeal arises, then these writs may issue. Prior to such an illegality the application can not be granted.

We have only stated such facts as were needful in deciding the application. Whether stated or not stated, they are all subject to review on appeal to the District Court. By no action can that court be divested of its jurisdiction to pass on the question raised.

It is therefore ordered and decreed that the preliminary restraining order be dissolved, and that the relator be taxed with the costs.

No. 12,166.

THE UNION OIL COMPANY VS. F. L. CAMPBELL, ASSESSOR, ET AL.

1. On rule to show cause when relator's demand is first met by a peremptory exception and such exception is overruled, the respondent is not thereby debarred from any further defence on the merits of the application.
2. The court, in its discretion, will prevent any improper advantage being taken by filing the exception separately from the answer; this was done in *Shaw vs. Howell*, 18 An. 196, when dilatory exceptions were presented evidently for delay.
3. A respondent in court on a rule to show cause invoked by the relator, has the right to be heard on the defences which he may urge, subject to the legal test as to whether they are such as he could legally raise. *Rouge vs. Lafargue Co.*, 47 An. 1649; *Ex rel. Morris vs. Secretary*, 48 An. 680-681.

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OIL Co. vs. Assessor et al.

4. The powers of the Board of Reviewers, created by Secs. 22 and 23 of Act No. 106 of 1890, are *quasi-judicial* in character and must be exercised in the manner indicated by law.
5. In the matter of the correction of the assessments of individual citizens or corporations, the Board of Reviewers is authorized to take action only upon a special opposition made by the party alleging himself to be aggrieved, and for the purposes of such a contest before the board a sworn declaration of the taxpayer, such as is required by Sec. 19 of Act No. 106 of 1890, is essentially necessary. *Ex rel. Johnson vs. Tax Collector*, 89 An. 538.
6. The declaration of the court in *Insurance Co. vs. Board of Assessors*, 40 An., p. 373, which announces another rule of construction, does not meet with the approval of this court.
7. An assessor called on by the Board of Reviewers to revise his rolls, has the right to call in question the fact whether the Board in making alterations therein had acted under the circumstances which the law required to exist as conditions of its taking action, though he be not authorized to dispute their conclusions of fact when acting within their statutory jurisdiction.
8. When powers conferred by statute have not been exercised, under the circumstances and requirements of the statute, the acts done fall for want of authority, even though they would have been right and sustained, had legal conditions as to action been complied with.

A PPEAL from the Eighth Judicial District Court for the Parish of Concordia. *Dagg, J.*

Elam & Dale, for Plaintiff, Appellee.

M. J. Cunningham, Attorney General, and *D. N. Thompson*, District Attorney, for Defendants, Appellants.

Argued and submitted June 2, 1896.

Opinion handed down June 15, 1896.

Rehearing refused November 16, 1896.

The opinion of the court was delivered by

NICHOLLS, C. J. Relator in its petition to the District Court represented that it was the owner of an oil mill in the parish of Concordia. That the police jury for that parish convened at the court house on the first Monday in July, 1895, for the purpose of reviewing the assessment or listing of all the taxable property and effects for the year 1895, and that said jury while sitting as a Board of Reviewers for said parish at the said session valued said mill and appur-

tenances at the sum of ten thousand dollars, being the valuation for the year 1895, as would appear by the resolution of said board made part of the petition. That Campbell, the assessor of the parish, had without the knowledge or consent of the relator and without any legal authority, either by judgment of the court or otherwise, since the valuation made by the Board of Reviewers for the year 1895, placed the assessment at the sum of seventy-five thousand dollars upon the tax rolls for said parish and refused to be governed by the board in putting the value of the mill at ten thousand dollars, although demand had been made upon him to comply with the action of the board. That he made said increase of the valuation after the adjournment of the board and that the State, Parish, Railroad and Levee taxes on the property in said parish are thirty-one mills.

That it was absolutely necessary for the protection of relator's rights that said assessor and the sheriff of the parish (*ex officio* tax collector) be ruled to show cause why said assessment or valuation of said mill should not be placed upon the tax rolls for said parish at the sum of ten thousand dollars, and that a writ of *mandamus* issue directed to them commanding them to place the assessment of said mill upon the tax rolls for the year 1895 at ten thousand dollars. Relator therefore prayed that said assessor and sheriff be notified, and that an order be granted ordering said officers to show cause at chambers why a peremptory writ of *mandamus* should not issue commanding said officers to put the valuation of said mill upon the tax rolls of said parish for the year 1895 at the sum of ten thousand dollars, and that this be the amount upon which taxation shall be based for that year; that after due proceedings there be judgment ordering them so to do, and declaring that said valuation should be the basis for taxation for the year 1895, and that a peremptory writ of *mandamus* issue commanding them to comply with said judgment. Defendants were ordered to show cause as prayed for.

The defendant's excepted that plaintiff's petition disclosed no cause of action and no legal right against them for a peremptory *mandamus*. This exception having been overruled, they answered, pleading the general issue. Campbell admitted he was the assessor of the parish, and averred that in pursuance of his duty as such and in compliance with the law and within the time specified by law, he listed the property of relator and affixed a valuation, as was his duty, thereon of seventy-five thousand dollars. That said valuation

was a fair, just and equitable valuation, and did not exceed the actual cash value of the property; that relator made no protest against said valuation and did not furnish any duplicate lists with its valuation under oath, as required by Sec. 19 of Act 108 of 1890. That the police jury, sitting as a board of reviewers, without any legal or proper contest on the part of the relator, without any notice to him, the assessor, and without hearing any evidence as to the value of said property, and in flagrant violation of the Constitution and laws of the State defining the duties of said Board of Reviewers, proceeded to make an original assessment of said property and to fix the valuation thereon for the purposes of taxation at ten thousand dollars, without any reference to the cash valuation of said property and without any reference to the uniformity or equality of the same. That said action of said board being contrary to law, arbitrary and unjust and injurious both to State and parish was absolutely null and void, without legal effect and was in no manner binding upon him and did not and could not change or affect the assessment and valuation of said property as made by said assessor. Defendants prayed that the demand for a *mandamus* be rejected—that the action of the board be declared null, void and of no effect, and the assessment and valuation as made by said assessor be recognized and maintained and that the sum of two hundred and thirty-two dollars and fifty cents (\$232.50), being ten per cent. upon the aggregate amount of taxes due by relator, be levied and taxed as attorney's fees against relator.

Relator filed a motion to strike out the answer on the ground that defendants having made an appearance and filed an exception could not file any subsequent pleadings, as all of the defences must be made at one and the same time and in one pleading. In the event of the motion being overruled it averred that defendants had no legal right to question the validity of the action of the Board of Reviewers fixing the valuation of the mill at ten thousand dollars, nor had they any legal power to raise the question as to the right of the board to fix said assessment, as the action of the board is final against the defendants, the State and parish, as neither have any legal standing to raise the question set forth in the answer because the law only gives the taxpayer the right to appear in court to have the assessment passed upon by the court. That the action of the board is final and the defendants, the State and the parish, are precluded and debarred from raising any question as to said assessment.

The court sustained this motion "in so far as the answer related to the valuation of the property or the evidence on which the police jury acted in ascertaining same or reducing said assessment."

On the trial a "certificate" of the president of the police jury attested by the secretary thereof was introduced in evidence to the effect that "on the 2d day of July, 1895, the following resolution was adopted by the police jury as a Board of Reviewers for said parish, to-wit:

"A resolution was adopted while the jury was acting as a Board of Reviewers continuing the assessment of the Union Oil Company, Vidalia Mill, for the year 1895 at ten thousand dollars."

A demand was made by relator on the assessor "to make his assessment roll for the year 1895 conform to the assessment equalization and valuation made by the police jury sitting as a Board of Reviewers at its regular meeting in July, 1895, as to the assessment of the Union Oil Mill Company's Vidalia Mill, to-wit: ten thousand dollars."

The ownership by relator of the mill in question was admitted, and the refusal of the assessor to comply with the demand on him shown. The assessment of the property by the assessor fixing the valuation of the property at seventy-five thousand dollars was offered in evidence. Campbell the assessor as a witness testified that he had made an assessment of the Union Mill in 1895, fifteen or twenty days prior to the meeting of the police jury. The Union Mill Company made out a duplicate list, but not sworn to. This list was made only a short time prior to the meeting of the jury, and was submitted to the jury—the amount of the other duplicate list was ten thousand dollars. The assessment lists are not always sworn to. The Union Mill Company opposed the assessment which he made. We find in the record a bill of exception by the defendants in which it is recited that the assessor being on the stand as a witness, defendants offered to prove that the police jury sitting as a Board of Reviewers, did not have any evidence before them as to the actual cash value of plaintiff's property; that there was no contest before them on the part of the oil mill of the valuation placed upon said property by the assessor; that the assessor was not heard in reference to the correctness of his valuation of said property; that the action of said board in placing the valuation of said property at ten thousand dollars for the purpose of taxation was had without any reference

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whatever to the value of the property and without any reference to the equality or uniformity of assessments, but was based upon other and different reasons. That relator objected to testimony on those subjects as irrelevant to the issues in the case and for the reasons set forth in relator's motion to strike out the answer of defendant which had been adopted by the court, and the motion to strike out therefore partially sustained.

That these objections were sustained and the evidence not permitted to be received. The District Court made the *mandamus* peremptory, decreeing that the valuation of ten thousand dollars placed upon the property by the Board of Reviewers should be taken as the value of the property for the purposes of taxation for the year 1895 and that defendants pay costs.

Defendants appealed.

Relator's claim, that the defendants having filed an exception that on the face of the papers relator showed no cause of action, they were forcibly debarred from setting up any ground of defence on the merits, is not tenable. The only matter which would be involved in that question would be one of delay. It was within the power of relator through the court to prevent any improper advantage being taken by filing the exception separately from the answer. This matter rests greatly in the discretion of the court. The court properly exercised its discretion in this case.

The exceptions filed in *Shaw vs. Howell*, 18 An. 195, were dilatory exceptions as to form, and the court must have been of the opinion that they had been presented for purposes of delay.

Relator denies the right of the assessor to raise the issues he has attempted to raise through his answer. Having been brought into court upon a rule to show cause invoked by the relator itself, defendant necessarily had the right to be heard (*Rouge vs. Lafargue Co., Limited*, 47 An. 1649). As a matter of course the issues which he tendered in defence were subject to legal test as to whether they were such as he could legally raise (*State ex rel. Morris vs. Secretary*, 43 An. 680-681). The District Court, in acting upon the motion to strike out the answer, correctly ruled that the assessor was not authorized, in this proceeding, to question the action of the Board of Reviewers in respect to the correctness of the conclusion of fact which they have reached touching the value of the relator's property, assuming that that matter was before the board under such con-

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ditions as to legally call for a decision by it on that point, but it went much further than this when it ruled out the testimony offered by defendants to sustain the position taken by them that the board acted without any legal or proper contest on the part of the oil mill, without any notice to the assessor, and that without hearing any evidence made an original assessment of the property at ten thousand dollars. Defendants claim that the board could only legally take action for the alteration of the assessment of property in individual cases when the property owner had presented to the local assessor a duplicate list, duly sworn to, and had made a formal opposition before him to the assessment which he had made in the particular case to accompany the general lists which he (the assessor) was required to transmit to the Board of Reviewers for its examination. That it could not dispose, as on its own knowledge, of an objection to the assessment of a particular person or corporation and dispose of it without notice to the assessor as the representative of the State, without giving him an opportunity to sustain the correctness of his action, and without the taking of testimony. That the action taken in this case by the board is not a revision of his assessment, but substantially and practically an original assessment which it is not authorized to make. That the board is a *quasi-judicial* body with no original powers and with no jurisdiction to act except upon a regularly formed contest and after giving to the State through him a hearing—that the police jury in dealing with the subject of the review of assessments was acting as a public agency outside of its usual functions as a police jury having legislative power and was without power to bring about the reduction of an assessment through a mere “resolution.”

The 22d and 23d sections of Act No. 106 of 1890 are as follows:

Section 22. “The police juries of the several parishes (parish of Orleans excepted) throughout the State are hereby appointed and constituted Boards of Reviewers for their parishes.

Sec. 23. “The Board of Reviewers shall meet on the first Monday of July of each and every year or as soon thereafter as possible, and the several assessors throughout the State, parish of Orleans excepted, shall lay before the said board all of said lists of property with the estimated (actual) cash value thereof extended and listed and valued by said assessors as aforesaid, together with the lists and valuation made under oath as aforesaid of those property holders

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who believe the assessor's valuation to be in excess of and beyond the actual cash value of the personal or real property therein enumerated, and the said board shall proceed at once to arbitrate upon the said lists of property and cash valuation, and their decision shall be final, unless set aside in accordance with Art. 208 of the Constitution; the said Board of Reviewers shall then proceed to examine all the aforesaid lists of real and personal property submitted to them by the said assessors and should they find any property to have been illegally or wrongfully assessed in the listing or valuation thereof, it shall be their duty to correct the same, and they shall also equalize the assessment of all property of like character and relative value within their respective parishes in accordance with Art. 208 of the Constitution, provided that no valuation made by the assessor shall be increased unless the taxpayer is served with notice to appear before said board within five days and show cause why such increased assessment should not be made. Such summons shall be signed by the president of the board; service therein and return made in the manner now provided by law in the case of ordinary *subpoenas*. The said board shall have the power to summon and compel the attendance of witnesses, interrogate them under oath concerning any matter before them, and after having passed upon and determined the correctness of any list and the valuation thereof, the same shall become final unless set aside, or changed as provided by law. The members of said Board of Reviewers shall receive the same pay for such length of time as they may be in session, as now allowed to police jurors; provided that if the session extend longer than fifteen days from date of service only pay for that length of time shall be allowed. The duplicate lists forwarded by the assessor with his assessment rolls are those referred to in the nineteenth section of the act, in which it is declared, that in case the valuations made by the assessor are, in the opinion and belief of the taxpayer, in excess of and beyond the cash value of the personal or real property, the assessor shall make or cause to be made, a duplicate list of said property, and shall then and there administer to the said taxpayer the oath or affirmation, as follows: I swear or affirm that the valuation affixed opposite each item of the property in the foregoing list is the actual cash value thereof, according to the best of my knowledge and belief, so help me God. The assessor shall subscribe such duplicate lists and submit them to the Board of Reviewers.

It is the duty of the assessor, after the completion of the assessment rolls, to give public notice to the effect that the listing had been completed and that they would be exposed in the office of the assessor for twenty days, and it has been repeatedly held by this court that, subject to some exceptions, parties having complaint to make of the assessment must do so within the time fixed as a condition to relief before the courts.

In *State ex rel. Johnson vs. Tax Collector*, 89 An. 538, this court quoted approvingly *Shattuck & Hoffman vs. City of New Orleans*, in which it was said: "The right of the taxpayer to appear before the standing committee of the City Council and be heard concerning the description of property listed and valuation of same as assessed, and the report of the standing committee on assessments of the City Council, are proceedings preparatory and prerequisite to the taxpayers' right of action to test the correctness of the assessment in the courts of justice," adding, "that the same rule must be applied to the revision and correction of assessments in the country parishes."

In the same decision we referred to the powers of the Board of Reviewers as being *quasi-judicial* in character, and referred to the necessity of their being exercised in the manner indicated by law, or in some similar manner.

Relator's position seems to be that the police jury, acting as a Board of Reviewers, are not called on to have before them testimony of any kind to show incorrectness in the assessments made by the local assessor, but that it was authorized to take notice of themselves of what they might conceive to be error therein and deal with it upon "*quasi-judicial* notice" or knowledge of the subject of some one or more members of the board. That the provisions of the law relative to taking testimony or making an investigation of the facts of the cases, were merely permissive. We do not so understand the law. We are of the opinion that in the matter of the correction of the assessment of individual citizens or corporations, the board is authorized to take action only upon a special opposition made by the party alleging himself to be aggrieved, and that a sworn declaration made by him, such as is called for in Sec. 19 of the act is required as essentially necessary for the purposes of such a contest before the board. We are of the opinion that it is no part of the duty of Boards of Reviewers to vindicate the wrongs, either actual or supposed, of individuals, and take any more interest in their af-

fairs than they do themselves and by taking action in their behalf practically dispense the parties from declaring, under oath, that they have, in point of fact, been injured and what, in their opinion and what the extent of that injury is, and enabling them to obtain relief through the voluntary action of the board from which they had cut themselves off by *laches* and inaction.

Relator calls our attention to Insurance Company vs. Board of Assessors, 40 An. 372, in which this court declared that the failure by a taxpayer to have complied with the legal requirement of making out a sworn duplicate list of his property was not a peremptory bar to relief. The question was raised under different conditions from those in which it is raised here. In that case the objection was urged at the threshold of a judicial investigation in a court of justice where the question of the correctness of the assessor's valuation was the precise issue about to be made, and during which, we assume, the claims of the party aggrieved would be required to be supported on the stand by his oath as a witness. In the present matter the question comes before us as an objection raised after what is claimed to be final action by the Board of Reviewers, in order to show that this duplicate list, which was the only basis upon which the board could have acted, was not before it, and, therefore, its action was substantially original and *ex parte*. We take occasion to say the course which the declaration made in the case referred to, announced as being permissible, does not meet with the approval of the court as presently constituted.

We do not understand that the lawmaker intended to invest in a small number of citizens, no matter how worthy they may be, the power of determining of themselves, and for themselves, without rule, check or limit, the rights either of their fellow-citizens or those of the State and parishes. The law contemplates a hearing of both sides, an examination and investigation as a condition to action. We had occasion to express our views on this subject in the matter of the Gaslight Company vs. City of New Orleans, 46 An. 1146, though it was brought to our notice under different sections of the act of 1890—sections having reference to the Board of Reviewers in the city of New Orleans. The principles lying behind the powers of the city board and those of parish boards are alike. The interests of the State and the country parishes are entitled to be protected as fully as those of New Orleans.

As we said in the Gaslight Company case, we do not think it was ever intended by the lawmaker to leave to any body of men free to change, arbitrarily of its own will, or through favoritism, dislike or prejudice, such assessments as they might think proper to select, and we repeat here what we said there, that we do not mean to intimate that the reduction of relator's assessment could not properly and justly have been made, and to the extent to which it was made, or that the board acted arbitrarily or improperly, but that it was called on to act under limited powers and under limitations and restrictions. When powers conferred by statute have not been exercised, under the circumstances and requirements of the statute, the acts done, fail for want of authority, even though they would have been right, and sustained, had legal conditions as to action been complied with. We do not pass upon the correctness or incorrectness, the regularity or irregularity of the assessment of the parish assessor. That matter is not before us at all. The question is, whether right or wrong, he can be made to change it in the manner and through proceedings such as have been brought to our attention in this case. We think not. Having performed his own duty he has the right to stand upon his rolls until they are revised and altered under conditions such as the law has required to exist to give the Board of Reviewers the power and authority to make the alteration. He has the right to call in question the fact that such conditions did exist and to place parties insisting upon an alteration upon proof of their existence. 47 An. 696. A "resolution" of the police jury, sitting as a "Board of Reviewers," declaring that the assessment of relator's property should continue at ten thousand dollars, did not convey to him the information which he was authorized to exact.

We are of the opinion that when the assessor raised an issue in this case, which he had the right to raise, that matters were not before the Board of Assessors of Concordia parish, under conditions such as to authorize or justify them in taking action in the matter of relator's property; that relator had imposed upon it the burden of showing affirmatively that the board was acting inside of its statutory power, or as it is frequently termed, its statutory jurisdiction. Relator has not done so.

We are not satisfied from the record of the actual state of the facts of the case. We think the court should not have excluded the

State vs. Washington.

testimony offered by the defendants. Through that evidence the whole situation would have been developed. We think that an opportunity should be afforded to bring everything connected with the matter out. For the reasons assigned,

It is hereby ordered, adjudged and decreed, that the judgment appealed from be and the same is hereby annulled, avoided and reversed; and, it is ordered that the cause be remanded to the District Court, and there reinstated and tried, and that, on the trial the testimony offered by defendants on the first trial, and rejected, be received.

No. 12,263.

STATE OF LOUISIANA VS. CHARLES WASHINGTON.

An information founded upon the Revised Statutes, Sec. 791, which charges that the defendant did feloniously, wilfully and maliciously, cut a person named with a dangerous weapon, with intent to commit murder, is good and sufficient in law.

A PPEAL from the Fifteenth Judicial District Court for the Parish of East Baton Rouge. *Brunot, J.*

M. J. Cunningham, Attorney General, and *H. N. Sherbourne*, District Attorney, for Plaintiff, Appellee.

J. A. Addison and *L. E. Droz* for Defendant, Appellant.

Submitted on briefs November 7, 1896.

Opinion handed down November 16, 1896.

The opinion of the court was delivered by

WATKINS, J. The information charges that the defendant did "feloniously, wilfully and maliciously cut Caroline Thompson with a dangerous weapon, viz., a hatchet, with intent to commit murder;" and he having been convicted of said charge and sentenced to one year's imprisonment in the penitentiary, prosecutes this appeal.

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State vs. Washington.

Counsel made a motion for a new trial on the sole ground that the verdict of the jury was contrary to the law and evidence, and it having been overruled, he filed a motion in arrest of judgment on the ground that the information does not charge that the act complained of was committed "feloniously and of his malice aforethought."

There is no bill of exceptions in the transcript, and consequently no explanation furnished by the record of the ruling of the judge or the grounds of defendant's complaint thereof.

As the motion of the defendant raises a question of law which is determinable upon the face of the information, we deem it our duty to examine and pass upon it, following the precedent established in *State vs. Balize*, 38 An. 542, and *State vs. Hanks*, 38 An. 468, and the authorities therein collated.

Our statute declares that "it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, wilfully and of his malice aforethought, kill and murder the deceased," etc (Revised Statutes, Sec. 1048), and this language has been interpreted to be sacramental in such indictment; but this defendant is being prosecuted on an information founded upon another statute, which declares that "whoever shall shoot, stab, or thrust any person with a dangerous weapon * * * shall suffer imprisonment at hard labor," etc. (R. S., Sec. 791)—a very different crime. The crime charged in this case is statutory.

State vs. Frances, 36 An. 336, is exactly such a case as this, founded upon the same section of the statutes, and against which the same motion in arrest was urged; and of that objection this court said:

"The indictment charges that the accused *feloniously* did shoot with a dangerous weapon, with intent to commit murder. It is drawn in accordance with the statute, which does not expressly require that the shooting must have been done wilfully, feloniously and with his malice aforethought. The words used in the indictment, 'feloniously,' and 'with intent to commit murder,' are amply sufficient"—citing numerous authorities.

The language of this information is stronger than that of the *Frances* case, as it charges that defendant did shoot with a dangerous weapon, and that the act was done "feloniously, wilfully and maliciously," "with intent to commit murder." It fulfils the requirements of *State vs. Bradford*, 38 An. 921.

State on the Relation of Rhodes.

It will be observed that in the indictment under consideration in *State vs. Green*, 36 An. 99, there was no averment of "malice aforethought," or words of equivalent import; and the same is true of that under consideration in *State vs. Scott*, 38 An. 387. We think the trial judge ruled correctly.

Judgment affirmed.

No. 12,260.

STATE ON THE RELATION OF H. J. RHODES.

The warrant of arrest is sufficient authority not to order the release of the prisoner.

The District Court in whose jurisdiction it is charged a crime was committed has taken cognizance of the case.

Cause is not shown to oust that court of its jurisdiction.

ON APPLICATION for a Writ of Habeas Corpus.

John C. Wickliffe for Petitioner.

Robert H. Marr, District Attorney, for Criminal Sheriff, Respondent.

Argued and submitted October 22, 1896.

Opinion handed down October 22, 1896.

The opinion of the court was delivered by

BREAUX, J. Petitioner for the writ alleges that the judge by whom the warrant of arrest was signed is not in the parish of Tangipahoa.

He also, in substance, alleges that the warrant of arrest was not addressed to the criminal sheriff of the parish of Orleans.

The warrant is addressed to the sheriff of the parish of Tangipahoa.

It is not illegal in form, and the sheriff to whom it was addressed made the arrest.

The sheriff, when authorized, may place the prisoner for safe-keeping in the jail of another parish than that in which the arrest has been ordered.

We must presume, until the contrary is alleged and proven, that the prisoner was brought to the jail of the parish of Orleans under proper order and authority.

State on the Relation of Rhodes.

The sheriff to whom a warrant is addressed may act through one of his deputies to whom the warrant is not, in terms, addressed.

He may also, in executing the order of the court, authorize the jailer to take charge of and hold the prisoner under the warrant of arrest originally issued to him. There is no necessity for obtaining another warrant of arrest especially addressed to the jailer or sheriff in charge of the jail in whose charge the petitioner is committed temporarily.

The warrant of arrest having the effect of a commitment for the time being, is not absolutely illegal. In another jurisdiction it has been decided that the warrant of commitment, if issued to the sheriff of the court in which the examination is held, will authorize his detention and custody by the sheriff of the next most convenient county having a jail. Church on *Habeas Corpus*, 2d Ed., par. 283.

This may also well apply to a warrant of arrest when invoked as in this case.

There is another objection fatal to the application.

The prisoner does not allege, nor was it said at the bar in his behalf, that he has applied for a hearing before the authority, under whose order he is in custody.

It was not shown that the judge is absent from the State or from his judicial district, and that ample hearing can not be had within a reasonable delay.

The court within the jurisdiction of which it is charged that a crime has been committed has taken jurisdiction. It can not, without the least notice, be ousted of its jurisdiction.

And lastly, it is "the spirit and intention" of the statute "that the several judges in this State shall have a general supervisory control over the officers appointed by the law to execute the writs issuing from and the orders of their courts." Sec. 1087, R. 8.

In view of the supervisory control of the judge of the Sixteenth District, we will not discharge the relator. *State ex rel. Bauman vs. Sheriff*, 44 An. 1014.

Where the proceedings are entirely void, the accused may be discharged, but not so where they are voidable. *American and English Encyclopedia of Law*, Vol. 9, p. 190.

The writ of *habeas corpus* is not granted and the application is refused.

State vs. Dillon.

No. 12,249.

STATE OF LOUISIANA VS. WILLIE DILLON.

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The defendant having been indicted for the larceny of a skiff, and the proof showing that he was found in possession of the property apparently stolen recently it was competent for him, as a witness in his own behalf, to negative the existence of felonious intent by stating that he had taken the skiff for the purpose of evading arrest under a warrant for robbery, and had carried with him a friend by whom it was to be returned to the owner.

Such testimony is perfectly competent and admissible. It is for the jury to determine what weight such evidence is entitled to, as well as the credibility of the witness.

A PPEAL from the Fourteenth Judicial District Court for the Parish of West Baton Rouge. *Talbot, J.*

M. J. Cunningham, Attorney General, and *Alex. Hébert*, for Plaintiff, Appellee.

Clarence S. Hébert for Defendant, Appellant.

Submitted on briefs November 7, 1896.

Opinion handed down November 16, 1896.

The opinion of the court was delivered by

WATKINS J. The defendant being convicted of larceny and sentenced to six months' imprisonment at hard labor prosecutes this appeal.

The information charges Willie Gibson and Willie Dillon jointly with the larceny of a skiff, but the prosecution against the former was abandoned by the State, and urged against the latter, alone.

The defendant filed a motion for new trial on the ground that the State utterly failed to make out against him "any intent to convert the skiff to his own use;" and the same having been overruled by the trial judge, he retained a bill of exceptions. It also appears from the motion, that the court, on the exception of the State, excluded from consideration by the jury, the proposed exculpatory statement of the defendant as a witness in his own behalf, to the effect "that his intent in taking the skiff was to escape" an arrest upon a warrant for robbery.

State vs. Dillon.

The statement in the bill of exceptions is, that the defendant, being on the stand as a witness in his own favor, proposed to make the following statement, viz. :

“ That at the time he took the skiff, a charge was pending against him in the justice court for robbery, and his intention in taking the skiff was not to convert same to his own use, but merely to escape arrest; ” and same having been objected to as irrelevant, the objection was sustained by the court.

The following are the reasons assigned by the judge, viz. :

“ 1. That the testimony is clearly immaterial.

“ 2. That the intent with which the property was taken must be determined by the jury from all the surrounding circumstances; and the declarations of the defendant as to another intent can not affect the case, and is in the nature of manufactured testimony.

“ 3. That if there is any criminal charge pending against him the declaration of the defendant is not the best evidence,” etc.

To this ruling of the judge the defendant excepted and tendered a bill of exceptions.

Was this ruling correct, and the evidence properly rejected; or was the defendant entitled to have it go to the jury—leaving it to them to judge of the weight it was entitled to, as well as of his credibility as a witness?

Our statute declares “ that the competent witness in all criminal matters shall be a person of proper understanding,” etc. Sec. 1, Act 29 of 1886.

It further provides, “ that the circumstance of the witness being a party accused, shall in no wise disqualify him from testifying; ” and “ if the person accused avails himself of this advantage he shall be subject to all the rules that apply to other witnesses,” etc. It further provides, that “ all testimony shall be weighed and considered according to the general rules of evidence; and the trial judge shall so charge the jury.” Sec. 2, *Ibid.*

In *State vs. Walsh*, 44 An. 1122, the court said that “ his credit ”—that of an accused—“ like that of other witnesses, is for the jury ” (at page 1135).

The correctness of the ruling of the court upon the motion for a new trial depends upon the correctness of his prior ruling as to the admissibility of the aforesaid statement of the defendant; for if that

statement was correctly disallowed, there is no doubt of his having correctly refused the application for a new trial.

His bill of exceptions embraces both propositions.

The trial judge distinctly grounded his ruling on the theory, "that the intent with which the property was taken must be determined by the jury from all the surrounding circumstances, and that the declaration of the defendant as to another intent can not affect the case."

There was no question of *res gestæ* in the lower court, and no objection that the statement of the defendant was hearsay was made.

The following is an extract from the proposed statement of the defendant, which is taken from the brief of his counsel, viz.:

"He offered this statement to the jury in substance: 'There was a warrant against me for robbery; my idea was to get out of the parish of West Baton Rouge to escape arrest. I took Willie Gibson along with me to send the skiff back by him. I had no intention to steal the skiff.'"

The foregoing is, in effect, corroborated by the statement we have extracted from the brief of the State, viz.:

"The nature of the testimony was about as follows: 'That in taking the property the accused had no felonious intention of converting the skiff to his own use, or to deprive the owner of it; that, on the contrary, he intended to send the skiff back by a party he had taken along with him for that purpose; that his object was to get away from the parish of West Baton Rouge, where a charge of robbery was pending against him, and he knew a warrant was out for his arrest.'"

Taken altogether, the different statements in the record disclose, that the defendant was found in possession of the skiff which had been recently stolen, apparently, thus giving rise to the supposition that he was the thief. By his own testimony upon the witness stand, the defendant proposed to show that he had no felonious intention in taking it, and none of converting the property to his own use, or of depriving the owner of it. That, in order to show his contrary intention, he proposed to state, that he was using the skiff as a means of making his escape from the parish of West Baton Rouge, where there was a charge of robbery pending against

him, and that he had with him in the skiff Willie Gibson to bring the skiff back again to the owner.

The information discloses that Willie Gibson was jointly charged with Willie Dillon with the commission of the larceny of the skiff, thus supporting the proposed statement of the defendant, in part; and the record shows the discontinuance of the prosecution as to the former, giving rise to an inference that it was correct in other particulars.

We do not understand that the proffered evidence in any way involves the existence or verity of defendant's prosecution for robbery, and hence the statement could not be regarded as secondary evidence, in any sense.

It is only to the effect that he was endeavoring to escape arrest under a warrant for robbery, and, in so doing, took the skiff and used it, intending to send it back by his friend Gibson, whom he had carried along for that purpose. Whether or not there was such a prosecution in fact would have been the next step in the course of the introduction of testimony; but the trial judge having disallowed the defendant's statement altogether, its introduction became unnecessary afterward.

However, the record was annexed to the transcript with the consent of this court, and the information against Willie Dillon, the defendant, and other proceedings in the cause of State vs. Will Dillon, No. 864 D. C., charging him with the robbery of Albert Washington of one check for eighteen dollars, in the parish of West Baton Rouge, on the 18th of June, 1896, form parts thereof, and which information bears date of filing September 14, 1896, the same exactly as the date of filing the information in this case—it charging against the defendant the larceny of the skiff on the 23d of June, 1896—just five days subsequent to the date the robbery is laid.

The defendant's bill of exceptions relates that at the time he took the skiff a charge was pending against him in the *Justice* court for robbery, and his intention in taking the skiff was not to convert same to his own use, but merely to escape arrest," etc. Now, as one information charges a robbery to have been committed on the 18th of June, 1896, and the other that the larceny was committed on the 23d of June, 1896—just five days intervening—and both informations having been filed in court on the 14th of September, 1896, is there not a reasonable probability of the proposed statement of the defendant being true in this particular?

State ex rel. District Attorney vs. Recorder.

His statement was directed at the existence of preliminary proceedings in the justice court *antecedent* to the filing of informations, founded possibly upon an affidavit; and had no possible reference to these informations *subsequently found*.

There may be something serious in this defence, or there may be none, but of one thing we feel quite certain, and that is that the trial judge erroneously disallowed the defendant's evidence. It should have been allowed to go to the jury for what it was worth.

It is therefore ordered and decreed that the verdict of the jury and the judgment and sentence thereon based be set aside, and the cause remanded for a new trial.

No. 12,246.

STATE EX REL. ROBERT H. MARR, DISTRICT ATTORNEY, vs. HENRY BEZOU, RECORDER.

The District Attorney may appear for the State in a criminal prosecution, on the part of the State, before the committing magistrate.

He may, also, if he is employed in the discharge of other duties, secure counsel to appear in his stead before the committing court, in which the preliminary examination is held.

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ON APPLICATION for Writs of *Mandamus* and *Certiorari*.

Relator *in propria persona*.

A. M. Aucoin and Lionel Adams for Respondent.

Submitted on briefs October 10, 1896.

Opinion handed down October 26, 1896.

The opinion of the court was delivered by

BREAUX, J. The relator, unable, he says, to attend the sessions of the Recorder's Courts, employed a duly licensed and practising attorney, to appear for the State, and conduct in his name and stead, a criminal prosecution.

The respondent, on the motion of the defendant, ruled, when the case

State ex rel. District Attorney vs. Recorder.

was pending in the court below—*i. e.*, in *State vs. Bonafon*, that the District Attorney was without authority to appear before a police court and examine witnesses; and, therefore, he was without legal power to send any one to represent him in the case before his court.

By the statute, it is made the duty of the District Attorney to represent the State in all civil and criminal actions.

Recorders, as committing magistrates, are vested with criminal jurisdiction.

This jurisdiction involves the discharge of highly important and responsible duties.

The law intends that a careful examination shall be made into the case, for and against the prisoner.

In principle, the difference between the trial of a case and a preliminary examination is not great.

In the former, the accused is convicted only in case of guilt beyond a reasonable doubt; in the latter, he is bound over or committed where there is probable cause to suppose that he is guilty.

In addition to the important duty of committing magistrate it devolves upon the recorders, before whom a preliminary examination is held, to transmit all depositions of witnesses to the court having jurisdiction, in order that they may be delivered to the Attorney General or District Attorney for the purpose of preparing information or indictment, as the case may be.

It would seem to follow that the District Attorney, charged with the prosecution of accused persons, should have the authority to appear before a court exercising the important functions just stated, and in the second place, that he should be heard, when the purpose is to assist in the preliminary examination, and in preparing and keeping a record of the proceedings.

Years ago, the question arose, as to whether the accused had the right to be represented by counsel in his examination.

This court maintained the right. *State vs. Oger*, 5 An. 744.

Such being the right of the accused, a similar right should not be denied to the State.

There was no law under which accused could claim, as a right, to be represented by counsel, and yet, the court decided in the cited case *supra* that privilege of counsel would not be denied in view of the importance of making a proper defence.

State ex rel. District Attorney vs. Recorder.

We do not think, in the case under consideration, the law is silent, or that there is no law upon the subject.

The District Attorney is authorized to appear and prosecute in all criminal cases coming before the criminal courts.

An examining court, though held by a recorder, has concurrent jurisdiction in preliminary examination cases with all courts having the authority of examining courts.

The case here is a criminal case, under examination before a criminal court. When a recorder sits in a preliminary examination his court is a court having jurisdiction, to that extent, in criminal cases, and it is not a mere police court, as urged by the respondent.

The magistrate, as a committing magistrate in criminal cases, is vested (it has been decided) with judicial power. *State ex rel. Goale vs. Recorder*, 30 An. 450, 455.

But conceding for a moment that the magistrate, in the exercise of this jurisdiction, does not put forth judicial powers; that he is a mere clerk, invested with entirely ministerial functions; in view of the fact that the depositions of material witnesses are to be transmitted to the District Court to be delivered to the District Attorney for the purpose of preparing the information or indictment, that officer should be heard when he offers to assist the court in the performance of that duty.

Having determined that the District Attorney should be heard when he offers to prosecute, in a preliminary examination; this conclusion leads us to the second branch of the case: the authority of counsel to appear for the district attorney.

A question similar arose in *State vs. Anderson*, 29 An. 774.

The court held that, "the District Attorney may employ associate counsel to aid him in a case."

This decision was affirmed in *State vs. Mangum*, 35 An. 619, and reaffirmed in *State vs. Mack*, 45 An. 1155.

The duties of the counsel are entirely ministerial. The functions are of reasonable obedience and service. They invoke no authority, discretion or jurisdiction of any sort. He has no authority to direct or control or exclude other counsel. He appears only to assist the court in procuring the presence of witnesses; in their examination, and in other proceedings of a committing court.

In other words the law officer of the State may, through counsel, give his advice and opinion to the committing court.

State ex rel. Voegtli vs. Judge.

This being the extent of the service, the defendant has no ground upon which to base an objection. He is without right and can not sustain the point urged in his behalf.

The right of the accused "to defend himself," does not include a right to challenge the authority of the District Attorney, to secure the service of counsel, when he, for good reason, is unable to be present, to examine witnesses and conduct the prosecution on preliminary hearing.

The defendant has the right to be heard personally, or through counsel before the committing court, but he has not the legal power to raise an incidental question, such as the one involved in this case. The legal defence is not affected by the service of counsel, who appears only to assist the court in the preliminary examination.

It is therefore ordered, adjudged and decreed that relator's prayer be, and it is granted, and the *mandamus* sought is made peremptory; and let counsel render service in accordance with the application made by the relator.

No. 12,244.

STATE EX REL. VOEGTLE VS. THE JUDGE OF THE CRIMINAL
DISTRICT COURT.

This court will not grant the writ of prohibition to restrain the Criminal District Court from proceeding on an information against the relator when the record on which the application for the writ is based, shows only the information charging an offence within the jurisdiction of the Criminal District Court, and a demurrer to the information. Constitution, Art. 90; Code of Practice, Arts 845 *et seq.*

APPPLICATION for Writs of *Certiorari* and Prohibition.

Charles H. Luzenberg for Relator.

Robert H. Marr, District Attorney, for Respondent.

Submitted on briefs October 3, 1896.

Opinion handed down October 10, 1896.

State ex rel. Voegtle vs. Judge.

The opinion of the court was delivered by

MILLER, J. The relator applies for these writs to arrest proceedings in the Criminal District Court on an information charging him with the violation of Act No. 18 of 1886, known as the Sunday Law. He filed a general demurrer, which being overruled, he seeks in this court the writs on the ground that the Criminal District Court has no jurisdiction of the charge preferred in the information.

The act besides requiring the closing on Sunday of all stores, saloons and other places of public business, forbids the sale, bartering, giving or delivering on Sunday of any of the stock or articles kept in such establishments. There is an exception of hotels, boarding houses, restaurants and some other establishments, the necessity of keeping open, the statute recognizes; but there is the prohibition of the sale therein of all intoxicating drinks, qualified by the permission that hotel keepers and boarding houses may serve wine for table use for their guests. The sale or delivery of malt liquors is not within the permission, and the prohibition of such liquors is repeated along with the permission as to wine.

The offence charged in the information is that the relator, as the keeper of a restaurant, sold, bartered and delivered on his premises, on Sunday, malt liquor to his guest. The general demurrer must be taken to admit the occupation of the relator as charged in the information.

The argument for relator in this court is, that he keeps a hotel with restaurant attached, that the law permits the hotel keeper to sell wine; that wine includes beer; hence there is no offence charged and no jurisdiction to try or punish him.

The argument is based on the theory that defendant is a hotel keeper, and the inferences from that assumption. We have no knowledge of his occupation, except that afforded by the information. That charges him not as of the occupation assumed in the argument, but as the keeper of a restaurant. Our inquiry, confined on this application to the face of the papers, is, whether the Criminal District Court had jurisdiction of the offence charged. Set out, as the charge is in the words of the statute, and met by demurrer, the statute and the previous decision of this court must be deemed to answer affirmatively the only question submitted to us. *State ex rel. Walker & Merz vs. Judge*, 89 An. 132.

This view relieves us from the necessity of considering the issues

State ex rel. Greene vs. Justice.

sought to be raised, that as a hotel keeper, the relator can serve his customer with beer under the permission to sell only wine, in connection with which we have had an elaborate argument to show the absence of any reasons to permit the sale of wine and prohibit that of beer. We take occasion to say that the reason for distinctions of this character is with the Legislature, and courts must take the law when plain in its terms as it comes from the lawmaker. But we omit any opinion on this defence urged in the argument, based as it is on the asserted occupation of relator, not shown by the record, and which we can not assume, but must take it as exhibited in the information.

The previous order made on this application is set aside, and the application is denied.

NO. 12,248.

THE STATE EX REL. GREENE, VS. FREDERICK, JUSTICE OF THE PEACE.

The defendant cited to answer the demand before the justice of the peace, is entitled on entering his appearance to a reasonable delay for procuring testimony, and if judgment against defendant is rendered without the opportunity afforded of obtaining his testimony, relief will be given by the writ of *certiorari*, directing the trial anew, and arresting the execution of the judgment. Constitution, Art. 90; Code of Practice, Arts. 1068, 1084, 864, 866; 35 An. 1101.

APPPLICATION for Writs of *Certiorari*, *Mandamus* and Prohibition.

J. Nelson Greene and W. P. Edwards for Relator.

L. L. Bourges for Respondent.

Submitted on briefs October 3, 1896.

Opinion handed down October 10, 1896.

The opinion of the court was delivered by

MILLER, J. The relator bases his claim for relief on that article of

State ex rel. Kiernan vs. Recorder.

the Code of Practice which entitles the defendant cited before a Justice of the Peace to a reasonable time for procuring his evidence.

It seems, that cited to appear, he applied for a commission to take testimony. Without issuing the commission, the justice decided the suit against the defendant. We think, under the circumstances, the trial should have been postponed until the desired testimony was obtained, or, at least, the opportunity for obtaining it was afforded. C. P., Arts. 1082, 1084.

We are better satisfied with this view, as the justice states in his return a new trial would have been granted if it had been asked.

It is therefore ordered that the judgment referred to in the application be set aside, and a reasonable time be allowed the relator to obtain his testimony, and the suit then proceed to judgment in due course.

NO. 12,258.

STATE EX REL. KIERNAN VS. THE RECORDER OF THE FIRST DISTRICT.

The contention that the judge of the lower court does not possess the qualification of citizenship can not be considered on an application for a *certiorari* to review the sentence or judgment of such judge. Constitution, Art. 90; C. P., Arts. 855, 857.

APPPLICATION for Writ of *Certiorari*.

Relator in propria persona.

Samuel L. Gilmore, City Attorney, for Respondent.

Submitted on briefs October 22, 1896.

Opinion handed down November 2, 1896.

The opinion of the court was delivered by

MILLER, J. This application is for a writ of *certiorari* to restrain the enforcement of the fine imposed on the relator by the First Recorder's Court, under the charge of disturbing the peace.

The writ authorized in unappealable cases is intended to correct proceedings in the lower court "absolutely void," as when the judg-

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ment is given without citation or hearing. Code of Practice, Arts. 855, 857. The petition for the writ assigns no cause within the scope of the writ. The allegation is that the recorder is not entitled to the office. The law provides remedies to test the right to public office. But, manifestly, that issue can not be raised in this form of proceeding.

The writ, too, is preventive. Its purpose is to arrest the execution of the void judgment. In this case the supplemental petition informs us the fine has been paid, though under protest. We can not give relief by *certiorari* for money claimed to have been illegally exacted. Code of Practice, Arts. 857, 866.

The previous order in this case is set aside, and the relator's application is denied.

 No. 12,065.

JAMES CULBERTSON VS. CRESCENT CITY R. R. Co.

The fact that a child may not be capable of contributory negligence, does not always render the defendant liable upon the mere proof of the act causing injury.

No liability for sudden act of a child.

If the defendant's employee was not careless or negligent, it can not be rendered liable.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard J.

O. B. Sansum for Plaintiff, Appellee.

Farrar, Jonas & Kruttschnitt for Defendant, Appellant.

Argued and submitted March 27, 1896.

Opinion handed down April 6, 1896.

Rehearing refused November 16, 1896.

The opinion of the court was delivered by

BREAUX, J. The plaintiff sued the defendant to recover damages for killing his son James, at the upper crossing of Soraparu street,

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on the night of Sunday, July 7, 1895, at 9 o'clock. The boy was 6 years and 11 months old.

The plaintiff says that his son was standing on the car track, plainly within view; the car moved slowly down, the projecting fender struck him and threw him across the fender frame, and from it, by the car's motion, he was thrown to the track; the fender passed over him and forced his body under the cars, causing almost instant death; that the motorman of defendant's car knew nothing of the accident until some one near from the street shouted to him that there was a child under the car.

That the motorman did cut off the power and applied the brakes, stopping the car within twenty feet from the point at which he thus applied the brakes.

The complaint further is, had the motorman looked down the street he could have seen the child in time to prevent the accident; that he was not watchful and attentive; that he failed to ring the gong.

The defendant denies that its employee was guilty of negligence. The jury found a verdict for plaintiff in the sum of fifteen hundred dollars.

From the verdict and judgement the defendant appeals.

This is another of the sad accidents, the cause of which this court is called upon to investigate and to familiarize itself with, in order to determine if damages are due.

The questions are principally of facts and no controversy in regard to the law arose in argument at the bar.

We take up the review of the facts (the incidents as they happened) according to the order of time. The gong was sounded and the alarm given as the car came down Chippewa, approaching the corner of Soraparu street. The motorman and the conductor were at their respective places, and the former had the electric power and the car brakes under his control.

We set forth the details of the occurrence as near the language of the witnesses, as possible, in view of the fact that some brevity and conciseness are required.

WITNESSES FOR THE PLAINTIFF.

The first who says he saw the accident, the witness Hyland, was about three-fourths of the way on Chippewa, walking up from

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Philip toward Soraparu street. The boy was standing on the up-town side of Soraparu street, near the track, the car descending, at the time was about one hundred feet from the corner. He says: "He was close to the track. I could not state positively whether he was on the track or in the middle of the track or not. I know he was between the banquette and the track. He was in that neighborhood close to the track."

"Q. Do you know that he jumped on the track?"

"A. I don't know whether he did or not."

Again he states: "Saw the child moving, could not state positively in what direction.

"He may have run across before my attention was directed to him." He says he was struck by the fender.

The companion of this witness, Murphy, who was walking and talking with him at the time, can't say whether the boy was standing on the car track, between the rails, or near the car track. The first witness, Hyland (with whom he [Murphy] was, as just stated), said nothing to him, although he, Hyland, says he saw the boy as he was struck by the fender and dragged.

This last witness, Murphy, states that he had no intimation that anything had happened before he saw the car stop and everybody run to it.

Another witness, Mrs. Nelson, saw the little boy standing on the little bridge over the small gutter, and afterward saw the fender strike him.

WITNESSES FOR THE DEFENDANT.

About the only testimony of any value of the first witness is, that she heard the car bell ringing the alarm at the moment of the accident.

The second witness was sitting about thirty feet from the place of the accident, and was looking in the direction to which the child was running. He thought the child had collided with the side of the car. Upon discovering that he had not, he gave the alarm; the car was stopped within twenty feet, and the child's body removed from under the car.

He answered: "Q. Did the bell of the car ring before it got to this corner?"

"A. Yes, sir.

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"Q. And the motorman couldn't have seen the child in time to stop the car before the accident?

"A. Surely not."

Another witness, Miss Birmingham, was talking with Mrs. Nelson and looking in the direction of the accident with Mrs. Nelson, and saw the boy cross over to the track. He appeared to be running after a dog. "He was standing on the Chippewa street side, and ran in the direction of his home, over toward Annunciation, and then appeared to be knocked down by the fender."

"Q. Did you see the fender knock him down?

"A. No, sir; I saw him pass the front, and I thought the fender must have knocked him down."

Again, at another time, while testifying:

"Q. Was the boy running or walking?

"A. He was standing until the car came and he ran across.

"Q. Could the man have seen him?

"A. No, sir; couldn't have seen him."

Another witness, Caroun, observed the boy playing between the rails, and at times near the track.

Caire, also a witness, says that the alarm was sounded at the time.

Another witness, Gitz, knows nothing having any bearing upon the issue, save that he heard the ringing of the bell before the car came to the corner.

The motorman and the conductor substantially testify that everything was done to prevent the accident; that the boy darted in front of the car, and that the motorman quickly stopped the car.

After as careful and close an analysis of the evidence as it was possible for us to make, we think that the weight of the testimony is with the defendant.

Plaintiff's theory that the little boy was standing on the track, between the rails, and that the motorman ought to have seen him, is not sustained by the evidence of his own witnesses; they do not testify, with any degree of certainty, where he was just preceding the accident. The witnesses for the defendant agree in stating that he was not on the track, and that the accident was occasioned by the sudden act of the child.

Granted as contended by the plaintiff that the motorman did not see the child before he was knocked down by the fender: if the child

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had escaped his attention, because of his sudden and unanticipated act itself, it becomes evident that the defendant is not liable. Whether he was seen or was not seen by the motorman would not render the defendant responsible, if owing to thoughtless impulse of the child he brought about the accident by a sudden act which could not be foreseen or guarded against by the motorman or any one else in charge of the car.

This brings us to the question of contributory negligence. Courts are averse to finding children guilty of contributory negligence, and are readily and properly inclined to disregard the thoughtlessness natural to boyhood, but accidents may happen for which the unconscious agent may not be responsible.

The fact that a child may not be capable of contributory negligence does not always render a defendant liable upon the mere proof of the injury. The test is negligence *vel non*. If the defendant or the defendant's agent or employee was not negligent, it is not liable.

The only alternative, after the conclusion reached, is to set aside the verdict.

The verdict and judgment are reversed, annulled and avoided.

The demand of plaintiff is rejected and his action dismissed at his cost in both courts.

No. 12,241.

STATE OF LOUISIANA EX REL. ALGIERS DEMOCRAT PUBLISHING
COMPANY VS. JUDGE OF THE THIRD CITY COURT OF NEW OR-
LEANS AND THE CONSTABLE.

The writ of *certiorari*, authorized to afford relief against "void" proceedings of the lower court to the prejudice of the suitor, will be refused to restrain the alleged illegal action of the constable in executing the writ of *feri facias*, the Code pointing out the methods of relief by application to the lower court and there having been no such application by relator. Code of Practice, Arts. 957 *et seq.*, 653, 1141, 1145.

ON APPLICATI**O**N for Writs of *Certiorari* and Prohibition.

Thomas F. Maher for Relators.

J. Paris Childress for Respondents.

State ex rel. Publishing Co. vs. Judge and Constable.

Submitted on briefs November 2, 1896.

Opinion handed down November 16, 1896.

The opinion of the court was delivered by

MILLER, J. The relators seek the writ of *certiorari* to obtain relief for an alleged illegal seizure of their property under the judgment against them rendered by the Third City Court for the city of New Orleans,

The record of the lower court transmitted in accordance with the writ shows the suit, judgment and execution against relators and the seizure of their property to satisfy the judgment. It appears also that relators obtained an injunction from the lower court to restrain the sale under the execution, the petition for the injunction alleging the illegality of the advertisement. The injunction suit was tried and submitted, but before it was decided the relators obtained the *certiorari*, which has suspended all further proceedings in the lower court.

The argument for the relators in this court urges that under the judgment for a small amount, property of far greater value was seized, and pending the injunction suit the constable threatened and would have removed the property but for the application to this court. The argument supposes that this threatened action of the constable furnished the basis for the exercise of the supervisory jurisdiction of this court.

The writ of *certiorari* is intended to review the action of the lower court and afford relief against its proceedings "utterly void" when, as the Code puts it, by way of illustration, the judgment has been pronounced without citation or hearing. If this court on the return of the *certiorari* sets aside the judgment of the lower court, the Code naturally directs that the execution of the judgment shall be restrained. Code of Practice, Arts. 85, 857. In this case there is no complaint of the action of the lower court. The citation, hearing, trial and judgment, followed by the execution, are not assailed. Nor is it contended the lower court did not grant the injunction or relators' application, pending for decision when that application was made here.

Under this condition of fact, there is, in our view, no room for the interposition of our writ. In the petition and order for the injunc-

State vs. Huey.

tion we perceive it is only the sale of the property which is enjoined, naturally, because the complaint is only of the illegal advertisement. If, however, the injunction had liberated the property from seizure, we must presume the lower court, on suitable application, would have ordered the constable to desist from removing it. If the seizure was excessive, or if still in force, and the relators objected to its removal pending the seizure, the Code points out the method of relief. Code of Practice, Arts. 653, 1141, 1145. But all relief of this character must be sought in the lower court; as the record stands it shows no such application. Until some right is denied the suitor in the lower court of the character indicated by the Code, there is no warrant for the writ of *certiorari*. In the Gooch case cited by the relator, 38 An. 669, the relief was sought against an execution on a judgment claimed to have been illegally rendered, and the alleged illegality, it was contended, was patent on the record. Yet this court denied relief on the ground the writ, confined as it is to the correction of void proceedings, could not be used to revise errors of judgment of the lower court in deciding questions within the jurisdiction of the court. With greater reason must the writ be refused in this case, when the redress of the alleged wrong of the relator is confided to the lower court, and the record shows no attempt to obtain relief at its hands.

The writ is therefore denied and our previous order is set aside.

NO. 12,251.

STATE OF LOUISIANA VS. THOMAS HUEY.

A party may be charged in separate counts in the same indictment with burglary and larceny.

APPEAL from the Third Judicial District Court for the Parish of Lincoln. *Barksdale, J.*

M. J. Cunningham, Attorney General, and *Charles B. Roberts*, District Attorney, for Plaintiff, Appellee.

W. A. Van Hook for Defendant, Appellant.

Submitted on briefs November 7, 1896.

Opinion handed down November 16, 1896.

Bank et als. vs. Manufactory.

The opinion of the court was delivered by
McENERY, J. The defendant was indicted for burglary and larceny. He was convicted, and moved in arrest of judgment that two different and distinct crimes, belonging to different generic classes, can not be charged in one indictment.

There are two counts in the indictment, the first charging burglary with intent to steal, and the second charging larceny.

It is well settled that a defendant may be charged in the same indictment, if in separate counts, with burglary and larceny, when they both spring from the same act. *State vs. Depass*, 31 An. 487; *State vs. King*, 37 An. 662; *State vs. Morgan*, 39 An. 214; *State vs. Nicholls*, 37 An. 779.

Judgment affirmed.

No. 12,197.

METROPOLITAN BANK ET. ALS. VS. COMMERCIAL SOAP, CANDLE AND STARCH MANUFACTORY.

A suspensive appeal will lie from a judgment appointing a receiver to a corporation.

48	1383
51	144
48	1388
110	742

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Dinkelspiel & Hart for Plaintiffs, Appellees.

W. S. Benedict for Defendant, Appellee.

Rice & Montgomery for Intervenor, Appellant.

Submitted on briefs June 22, 1896.

Opinion handed down June 22, 1896.

Rehearing refused June 30, 1896.

Dismissed by consent November 2, 1896.

ON MOTION TO DISMISS.

The opinion of the court was delivered by
McENERY, J. This is an appeal from a judgment appointing a re-

State ex rel. Holsom vs. Recorder.

ceiver. A suspensive appeal was taken. The motion to dismiss is on the ground that the judgment appealed from was one which should be provisionally executed, notwithstanding the appeal, and therefore no suspensive appeal would lie therefrom.

Some judgments, notwithstanding the suspensive appeal, are provisionally executed. These are named in Art. 580, paragraphs 1 and 2, C. P., and Art. 1059, C. P.

The appeal for the appointment of a receiver to a corporation is not enumerated, and is therefore excluded.

The motion to dismiss is therefore overruled.

No. 12,257.

STATE EX REL. SARAH HOLSOM VS. HENRY BEZOU, RECORDER SECOND RECORDER'S COURT OF THE CITY OF NEW ORLEANS.

Act No. 45 of 1896 does not disturb the jurisdiction of the Sixth Recorder's Court as established by Act 154 of 1894, and will not do so until the next election for city officers as provided by Sec. 112 of Act 45 of 1896.

ON APPLICATION for Writs of *Certiorari* and Prohibition.

Charles J. Théard and *John St. Paul* for Relator.

Samuel L. Gilmore, City Attorney, for Respondent:

The Legislature has authority to change, at any time, the number and territorial jurisdiction of the Recorders' Courts of the city of New Orleans. *Crook vs. People*, 106 Ill. 244; *People vs. Brown*, 83 Ill. 96; *Mechem on Public Officers*, Secs. 465-466; *Dillon on Municipal Corporations*, Vol. 1, p. 140, Sec. 85; *Reynolds vs. Baldwin*, 1 An. 163; Art. 254, Constitution of 1879; Art. 136, Constitution of 1879.

Recorders of the Recorders' Courts of the city of New Orleans are municipal officers. Chap. 12 of Acts of Legislative Council of the territory of Orleans of 1805. Art. 23 of Cons. of 1812; Art. 128 of Cons. of 1845; Art. 124 of Cons. of 1852; Art. 94 of Cons. of 1868; Art. 136 of Cons. of 1879; Acts of 1852, p. 144; Act 95 of 1873; Act 71 of 1874; Act 131 of 1877, E. S.; Act 85 of 1878;

State ex rel. Holsom vs. Recorder.

State ex rel. Michel vs. Campbell, 25 An. 341; State vs. Ramos, 10 An. 422; State ex rel. Whitaker vs. Adams et al., 46 An. 834; State ex rel. Emerson vs. Mayor, 16 An. 395; Reynolds vs. Baldwin, 1 An. 162; State ex rel. Howard vs. Walshe, 32 An. 1234; Michel vs. City, 30 An. 1097; Brittin vs. Steeker, 62 Mo. 370; Act No. 45 of 1896, the new charter, in so far as it provides for the offices which are to constitute the city government, takes immediate effect. Secs. 122, 75 and 125 of Act. No. 45 of 1896; People vs. Brown, 83 Ill. 97; Crook vs. People, 106 Ill. 244; Dillon on Municipal Corporations, 4th Ed., p. 305, Sec. 221, Note; Mechem on Public Officers, Sec 408; Chandler vs. Lawrence, 128 Mass. 213; City of Shreveport vs. Maples, 27 An. 636; The exception in regard to municipal officers elected on April 21, 1896, contained in Sec. 122 of Act No. 45 of 1896, the new city charter, does not suspend the operation of Sec. 68, reducing the number of Recorders' Courts of the city of New Orleans from six to four, and extending the jurisdiction of the Second Recorder's Court of the city of New Orleans. Connor vs. New York, 5 N. Y. 285; People vs. Roper, 35 N. Y. 639; People ex rel. Gery vs. Whitlock, 72 N. Y. 198; Nicholls vs. McLellan, 101 N. Y. 533; Layton vs. New Orleans, 12 An. 516; State ex rel. Whitaker vs. Adams et al., 46 An. 834.

Submitted on briefs October 26, 1896.

Opinion handed down November 2, 1896.

The opinion of the court was delivered by

MCENERY, J. The relatrix was arrested for violating a city ordinance, and taken before the Second Recorder's Court for trial. She demurred to the jurisdiction of the court on the ground that the offence was committed within the jurisdictional limits of the Sixth Recorder's Court. The respondent's return says, that the jurisdiction of the Second Recorder's Court, by Act 45 of 1896, now embraces the territory of the Third and Second Municipal Districts. There were six recorder's courts established for the city of New Orleans by Act 154 of 1894. Unless abolished by Act 45 of 1896 they still continue to exist, with their jurisdictions as established by Act No. 154 of 1894.

State ex rel. Holsom vs. Recorder.

Section 68 of Act 45 of 1896 says there shall be four police courts in the city of New Orleans, and defines the territorial jurisdiction of each. Sec. 69 establishes the qualifications for the judges of the city courts, which are different from the qualifications required by the old city charter, under which the present six recorders were elected and inducted into office. Unless there had been in the act, if the reorganization of the police courts took effect, after its promulgation, some provision for new incumbents, having the qualifications required by the act, and designating the persons who should fill the offices, there would be confusion, as it would be impractical to give qualifications to the present recorders when they did not possess them, and it would be equally impractical to select from the six recorders, who were duly elected to fill the four police offices. That the act makes no such provision to avoid confusion is an expression, if there were any doubt on the matter, that the Legislature intended that the six recorders should continue in office until they were replaced by the election of four recorders having the necessary qualifications at the next general election. But the act provides against any contingency of doubt or uncertainty.

Section 122 provides that the act (city charter) shall take effect, in all respects, after due promulgation as provided by law, except that the various municipal officers and councilmen elected at the general election held April 21, 1896, shall continue in office until the expiration of the term for which they were elected, and until their successors are duly qualified.

A part of the act is to take effect after promulgation, and a part in the future, which is not an uncommon mode of expressing legislative will. Twenty-third American and English Encyclopædia of Law, page 223, paragraph 8.

It is plain that all officers elected by the people at the general election held April 21, 1896, shall continue in office until the election provided for in Sec. 122 shall take place.

The writ of prohibition, issued herein, is perpetuated.

MR. JUSTICE MILLER concurs in this decree.

State vs. Allen.

No. 12,247.

STATE OF LOUISIANA VS. SARAH ALLEN.

On the trial of a party accused charged "with shooting with intent to murder" it is sufficient for the court to charge that it devolved upon the State to prove beyond reasonable doubt that the shooting was done wilfully, maliciously and with malice aforethought.

Under such a charge it would be impossible for a jury to bring in a verdict of conviction unless the condition of the evidence was such as would forcedly beyond a reasonable doubt, exclude the hypothesis of the shooting having been accidental.

A PPEAL from the Fourth Judicial District Court for the Parish of Grant. *Machen, J.*

M. J. Cunningham, Attorney General, and *A. B. Hundley*, District Attorney, for Plaintiff, Appellee.

W. C. Roberts for Defendant, Appellant.

Submitted on briefs November 7, 1896.

Opinion handed down November 16, 1896.

The opinion of the court was delivered by
NICHOLLS, C. J. Defendant having been found guilty of "shooting with intent to murder" has appealed.

The bill of exception upon which she relies recites that the court having charged the jury and having called upon defendant to know whether she desired any special charge to be given to the jury, requested the following charge to be given:

"Defendant asks the court to charge the jury that the burden is upon the State to show that the shooting was not the result of accident but was wilful and intentional, which charge the court refused to give as aforesaid."

Appended to the bill are the following reasons:

"The court declined to give the special charge for the reason that it had already charged that it devolved upon the State to prove beyond a reasonable doubt that the shooting was done wilfully, maliciously and with malice aforethought, and after having explained

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to the jury the elements of murder, further charged them, that unless they found from the evidence that had death resulted from the shooting, the killing would have been murder, they could not find the defendant guilty as charged in the indictment, and the court had already, at request of defendant's counsel charged the jury, that it there was a reasonable doubt in their minds as to whether or not the shooting was the result of accident, they must give the accused the benefit of the doubt and acquit her."

The special charge given as to "reasonable doubt" is declared by the court to have been given at the request of the counsel of accused himself, and it is not by the bill of exceptions made the subject matter of defendant's complaint. What is complained of is that the court did not instruct the jury that "the burden was upon the State to show that the shooting was not the result of accident, but was wilful and intentional." The court charged the jury that "it devolved upon the State to prove beyond a reasonable doubt that the shooting was done wilfully, maliciously and with malice aforethought." The only portion, therefore, of the requested charge which the court declined to give was that "the burden was upon the State to show that it was not the result of accident."

Under a charge which required for the purpose of conviction that the evidence should have established beyond a reasonable doubt the fact that the shooting was done wilfully, maliciously and with malice aforethought, it was impossible for the jury to have imagined that it could bring in a verdict of conviction unless the condition of the evidence was such as would forcedly, beyond reasonable doubt, exclude the hypothesis of the shooting having been accidental.

We do not think appellant has any legal ground for complaint.

The judgment is affirmed.

No. 12,254.

STATE OF LOUISIANA VS. SAM DAVIS ET AL.

In criminal cases where there is no bill of exception, nor assignment of errors, and there is no error patent upon the face of the record—the judgment of the District Court will be affirmed. *State vs. Behan*, 20 An. 386; *State vs. Kreppit*, 20 An. 402.

A PPEAL from the Eleventh Judicial District Court for the Parish of St. Landry. *Dupré, J.*

Levy vs. Fenner et al.

M. J. Cunningham, Attorney General, and *R. Lee Garland*, District Attorney, filed a brief for the State.

Opinion handed down November 16, 1896.

The opinion of the court was delivered by

NICHOLLS, C. J. Sam Davis and Andrew Davis having been found guilty, under an indictment for larceny, and each sentenced to the penitentiary; they have appealed.

The record contains motions of no kind, and no bills of exception. No formal assignment of error has been made and appellants have made no appearance nor suggested any ground for reversal. We, of ourselves, discover none. The appeals were evidently taken solely for delay.

The judgments appealed from are hereby affirmed.

No. 12,044.

LIONEL L. LEVY VS. CHARLES E. FENNER ET AL.

- (1) In demolishing the old and building the new party wall, under the conditions fully proved in this case, the plaintiffs exercised an absolute right conferred upon them by the law. Under the maxim, "*Neminem laedit qui jure suo utitur*," they were not bound to indemnify their neighbor for any inconvenience or injury necessarily occasioned by the exercise of the right. Such a work must necessarily incommode the neighbor. It can not be prosecuted without an entry upon and partial occupation of his premises. It must disturb his enjoyment and that of his tenants. It may give ground for the annulment of his leases or for a diminution of rents. It may prevent the renting of his property. It may injure him in many ways. But so long and in so far as these injuries are inseparable from the exercise of the right, the neighbor is bound to submit to them and can claim no indemnity therefor.
- (2) But, on the other hand, plaintiffs are responsible for any exaggeration of these necessary damages, which, by any diligence, they could have prevented. They were bound by every means in their power to reduce to a *minimum* the injury and inconvenience occasioned to their neighbor; to occupy his property to the least extent and for the shortest time consistent with the exercise of their right, and to hasten by all practical means the completion of the wall and the restoration of the neighbor to the full enjoyment of his property. They were, moreover, bound, at their peril, to replace the neighbor at the end of the work in a position equal in every respect to that which he occupied in the beginning, and to furnish him with a wall fit and adequate to support his building without injury.

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A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Farrar, Jonas & Kruttschnitt for Plaintiff, Appellant.

Fenner, Henderson & Fenner for Defendant, Appellees.

Argued and submitted May 23, 1896.

Opinion handed down June 22, 1896.

Rehearing refused November 30, 1896.

The opinion of the court was delivered by

WATKINS, J. The plaintiff claims damages in the sum of \$2770, as having resulted to his property by the demolition of an old, and the subsequent erection of a new building by the defendants upon the adjacent premises, the plaintiff and defendants being proprietors of adjoining buildings on Baronne street, in the city of New Orleans, with a wall in common between them.

After issue joined and a trial by the judge, there was a judgment in favor of the defendants, rejecting the plaintiff's demand with the following reservation, to-wit:

"Reserving his right to claim for injury to the plastering and paper on the walls, and inconvenience caused by the rubbish and debris left on his premises by defendants, and the expense of the removal of same, as well as for rents lost by the unnecessary protraction of the work—all of his claims for these items being dismissed as of non-suit."

From that judgment the plaintiff has appealed.

The following is taken from the brief of plaintiff's counsel as a fair synopsis of his grounds for claiming damages, viz:

"The petition alleges substantially as follows:

"That Charles E. Fenner and Samuel Henderson, Jr., are indebted to plaintiff in the sum of twenty-seven hundred and seventy dollars, for this:

"That plaintiff owns the three-story brick building, No. 15 Baronne street, in the city of New Orleans, and has owned it for many years past; that on or about March 20, 1893, the defendants,

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who own the premises adjoining those of petitioner on the upper or Common street side thereof, tore down and demolished the buildings standing upon their said premises, and proceeded to build upon the same a new five-story building, known as the Medical Building; that the new building was a much larger and heavier one than the one which had stood upon the premises belonging to defendants, and that, in the course of the construction of the new building, defendants tore down and destroyed the party wall separating the new building from that of petitioner, and built a new party wall of greater width, height and weight than the old one; that in the course of the destruction of the old party wall and the construction of the new party wall defendants and their employees, through their fault, negligence and want of skill and care, caused heavy damages to the building and premises of your petitioner, said damages being due to the insufficient shoring up, supporting and bracing of petitioner's building while the support of the party wall was removed, and also to the settling of the new party wall, either by reason of insufficient foundations or of other causes to petitioner unknown. The damages are alleged to consist of the destruction of all levels in petitioner's building, causing cracks and fissures in the walls thereof, and the straining out of shape of the doors and window frames, so as to prevent the doors and windows from properly closing, the breaking of a large plate glass window in the front of the premises; the destruction and failure to rebuild a portion of the wall of petitioner's building, and in many other items of damage too numerous to mention in the petition, but to be proved in detail at the trial. That in the party wall on petitioner's side thereof were several flues which were improperly reconstructed. That in order to restore petitioner's premises to the condition in which they were before the tearing down of the building of defendants it will be necessary to take down and rebuild the brick front thereof; to repair and reset all doors and window frames; to shore up the front of the gallery; to raise certain floors and joists so as to level the floors in the building; to repair the ceilings and the roof; to replaster a great part of the interior; to repair all pipes and drains in and about the premises, and also fireplaces and flues therein, and to make a great number of other repairs, to be more fully detailed at the trial.

“That the new party wall was constructed without any regard to

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petitioner's rights, and that all those portions of petitioner's premises adjoining the new party wall required a general overhauling and repairing. The defendants and their employees left petitioner's premises in an almost uninhabitable condition for a period of four months, whilst they were tearing down and rebuilding the party wall, whereas it could easily have been torn down and reconstructed within a delay of three weeks, if defendants and their employees had exercised ordinary diligence in the premises, and that petitioner was compelled to allow a material reduction in rents to his tenants by reason of the unreasonable and negligent delays of defendants and their employees in the reconstruction of the party wall, and the consequent inconvenience and annoyance to which his tenants were subjected.

"The plaintiff alleges that it will cost two thousand three hundred dollars to restore the building to its condition prior to the building of the party wall, and that the damages due to petitioner by reason of the unnecessary delay in the building of the party wall, and inconvenience to which his tenants were subjected, and the allowance made therefor by him to said tenants for the difference in time between the delay necessary to tear down and rebuild said party wall and the time actually consumed, amounts to the sum of one hundred and seventy dollars, and that the time which will be required to repair the premises and restore them to their former condition will be about two months, and that the rent value of the premises is one hundred and fifty dollars per month.'

"The prayer is for the recovery of two thousand seven hundred and seventy dollars, with interest from judgment until paid."

The defendant's answer is prefaced with the following peremptory exception founded on law, to-wit:

That they are not answerable for the damages claimed, for this, to-wit:

That they had the legal right to build the larger and heavier building which they constructed on their property as alleged in the petition, and to tear down the old party wall separating said new building from the building of the plaintiff, and to build a new party wall of greater width, height and thickness than the old one, necessary to support said new and heavier building; and that plaintiff was bound to submit to the loss and inconvenience resulting from the proper execution of said work.

That, in the exercise of said legal rights, they entered into a contract with a competent and trustworthy builder, to construct said new building, including the demolition and reconstruction of said party wall, and the restoration of the plaintiff's building, all of which he bound himself to do in a proper and workmanlike manner; and that they yielded up to said contractor and builder the entire possession and control of said premises and work, reserving to themselves no direction or control as to the manner of doing the work, or as to the persons whom he should employ therein.

That said builder was, in all respects, an independent contractor, and, if damages were caused, through his fault, negligence, want of care, or skill, he alone, is responsible therefor.

Reserving the benefit of said exception, they make the following answer, substantially, viz. :

That the aforesaid contractor and builder bound himself to shore up the roofs and floors of the adjoining properties, and take down the party wall, and old foundations, and excavate for the new; protect the interior of adjoining properties and their contents, by proper and sufficient uprights and weather-boarding; and after new walls are up, restore these properties, in every respect, as they were, before the shoring and taking away of their walls was commenced; and to execute the same in a true and workmanlike manner. That, by virtue of said contract, said builder and contractor is responsible to them for any damages they may be held liable for to the plaintiff by reason of his failure to comply therewith; and that should they be condemned to pay plaintiff damages by reason of any fault or negligence of said contractor, they are entitled to like judgment over against him in warranty.

Thereupon, said builder and contractor appeared and joined the defendants in their answer, and fully admitting his liability to them, and his obligation to hold them harmless in the premises, he waived any formal call or citation in warranty and voluntarily made himself a party to the suit, and, for answer to the plaintiff's demands, plead a general denial.

He specially averred and represented, that before he touched the building of the plaintiff he, himself, made a very careful inspection thereof, and, also, caused a similar examination to be made thereof by others. That upon said examinations, it was ascertained that the building was old and in bad condition; that the front wall was rot-

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ten and badly cracked in numerous places; and that the building was out of level and inclined toward No. 17 Baronne street.

He further averred that he caused a measurement to be made and found a depression of about three inches on that side. That he further ascertained, in the course of that investigation, that the doors and windows were out of plumb. He further avers, that in tearing down the old party wall, he ascertained that it had been built on an entirely improper and insufficient foundation, having nothing but a one-brick footing or projection, with a single plank under it as far back as the three-story wall extended; and, beyond that, no footing at all, save and except a single plank under the wall. That such a foundation readily accounted for the sinking which had taken place in plaintiff's building on that side.

He further represents, that when he began tearing down the party wall, he discovered that the front wall was insecure and in danger of falling when the support of the party wall was removed. That plaintiff informed him that the City Engineer's office had condemned, or was talking of condemning, the said front wall; and that he obviated the necessity of this by carefully bracing and tying the wall, which would have been unnecessary if the wall had been sound. That by this means, he maintained the walls of plaintiff's building until the new and solid walls of the new building were erected; and that he then securely attached them thereto, leaving them in a better condition and much more secure than they were before.

Said contractor further answering specially denies that the shoring up, bracing and supporting of plaintiff's building were insufficient; but, on the contrary, he avers that the same were done in the best manner possible and with the greatest care.

He denies that the flues in the plaintiff's building were improperly replaced after the new building was completed; and specially avers that he placed them exactly as they were before.

He avers that said party wall was built with all possible regard for the plaintiff's rights, and as rapidly as circumstances would admit—reciting in detail and with precision some of the occurrences that caused unavoidable delay.

He emphatically affirms, that no repairs were required in order to restore the plaintiff's building to the condition it was in prior to the said work being commenced, and he avers that said building is in as good and, indeed, better condition than it was before said work was begun.

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That, in addition, and although not bound to do so, and to avoid a lawsuit, he has offered, at his own expense, to do everything reasonable to satisfy the plaintiff's complaint, but that his offers have all been declined. This extended analysis of the pleadings will more readily bring the testimony within proper bounds, and render same more easily comprehended.

It is well to observe that we find nothing in the record to justify us in disturbing the ruling of the judge *a quo* with respect to the reservations made in his decree.

In his reasons for judgment, he says:

"It is claimed that defendants protracted the work unnecessarily; that in consequence plaintiff's tenants were disturbed, and to some extent dispossessed, and that he was compelled to grant commutations of rent to them. It is proved that some time was lost, by reason of the failure of defendants' contractor to obtain material as needed. It is likewise proved that the contractor completed the work within the stipulated time and delivered the building.

"It is testified by expert witnesses that the work was prosecuted and completed within a reasonable time. I am not prepared to decide presently that plaintiff can recover on this ground, and I deem it best to reserve plaintiff's rights on this subject.

"But it is proved that by reason of leaks and exposure the plastering and papering on the interior walls were injured and stained, also that plaintiff was put to some trouble and expense, in the removal of the *debris* of the work from the premises.

"It is proved that allowance was made to Mr. Logan, a tenant, for new papering. The evidence leaves the exact dates and the amounts in doubt. There was a fire about the middle of July, and the evidence indicates the other items as of date in October. The insurance company made repairs and for damages to the roof the insurance made reparation.

"I am inclined to think that plaintiff may have a meritorious claim for some amount for injuries to the plastering and papering, and also for expense incurred in removing the *debris* from his premises. I have studied the record and I regret that I find no *data* upon which to make even an approximate estimate. It was plaintiff's duty to make his case certain." These are the matters which are embraced in the reservations in the judge's decree.

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On the main issue, the *gravamen* of the plaintiff's case is distinctly stated in the subjoined allegation of his petition, viz.:

"That, in the course of the construction of the new building, defendants tore down and destroyed the party wall separating the new building from that of petitioner, and built a new party wall of greater width, height and weight than the old one; that in the course of the destruction of the old party wall and the construction of the new party wall defendants and their employees, through their fault, negligence and want of skill and care, caused heavy damages to the building and premises of your petitioner, said damages being due to the insufficient shoring up, supporting and bracing of petitioner's building while the support of the party wall was removed, and also to the settling of the new party wall, either by reason of insufficient foundations or of other causes to petitioner unknown."

That is to say, that in the course of the destruction of the old party wall, and the construction of a new one, defendants and their employees, through their fault, negligence and want of skill, caused damages to the plaintiff's building in the particulars enumerated; and the petitioner then specified the cause of same to have been, *first*, in the "insufficient shoring up, supporting and bracing of petitioner's building, while the support of the party wall was removed," and *second*, "the settling of the new party wall, either by reason of insufficient foundations, or of other causes unknown."

All of these allegations are emphatically denied by the defendants, and the contractor and builder.

As the charges and defences are common to both the defendants and the contractor, same may be taken together and disposed of.

The foregoing synopsis, and statement show this case to depend almost entirely upon questions of fact—both parties relying exclusively upon a single decision of this court, as solving the questions of law that are involved.

And unfortunately, as in many cases, there is a serious and, seemingly, irreconcilable conflict between the statements of the witnesses, which greatly embarrasses the court in arriving at an accurate and just conclusion as to the rights of parties.

The substantial facts, as detailed by the witnesses, are as follows, viz.:

William Fitzner, an experienced architect, states, as a witness for

the plaintiff, that he made an examination of the plaintiff's premises, prior to the construction of the new building of the defendants, and identified the annexed report, of date of March 7, 1893, of his examination thereof to the plaintiff.

L. L. Levy, Esq. :

"The undersigned have this day examined your building, No. 15 Baronne street, as to its condition, and report as follows:

"The party wall between Nos. 15 and 17 Baronne street, is a 13-inch wall and is in good condition; there is one crack in the said party wall, in rear of the third story high part of building, which could be easily repaired.

"The roofs of building (zinc and slate) are in good condition. The valley gutters and flashing of roofs and down pipes are in good order.

"The width of your building between party walls is 19 feet 10 inches in clear; against party wall, between Nos. 15 and 17, are two chimneys with 5 feet 8 inches breast, and in rear one chimney with 4 feet 8 inches breast; the fireplaces are in good order, with grates, fenders and blowers complete. The mantels are of iron. The floors of first and second story of building are level; the floor of third story is one-half inch high at party wall between Nos. 15 and 17 Baronne street.

"The party wall between 15 and 17 is furnished with ceiling stuff in first story, and plastered in second and third story; the plastering is furred out in rear of second story (at last room).

"The front wall of your building is straight and plumb, and the galleries are in good order.

"Very respectfully, etc.,

(Signed) "WM. FITZNER, Architect,

"JOS. C. TIERNEY, Carpenter.

"New Orleans, March 7, 1893."

The witness states that the said examination was made at plaintiff's request, who accompanied him, stating as his reason for desiring the examination and report was, that the defendants intended to erect a new building, and he wished to know the condition of the building as it was then.

This witness testifies that he made another examination and report to the plaintiff on the 14th of October, 1893, after the new structure

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of the defendants was completed, and which is of the following tenor, viz.:

“ *L. L. Levy, Esq.:*

“ According to your request, I have examined the three-story building, No. 15 Baronne street, to ascertain the damages sustained by the erection of adjoining new medical building, and now report as follows:

“ *Front.*—The front of building was badly damaged, cracked and torn up by the insufficient shoring, tying and bracing during erection of new adjoining building, and has suffered additionally by the settling of same. The front of building is unsafe and ought to be rebuilt as soon as possible.

“ *First story.*—The store floor is three inches out of the level, the lowest part being on the side of new party wall. The board lining of new party wall is badly put up and left incomplete. The store ceiling is left incomplete under one of the upper chimneys, the jams of which are started too low and leaving a hole which is covered by a metal sheet.

“ *Second story.*—The floor is two and three-fourth inches out of the level, the lowest part being on side of new party wall; the skirting on the new party wall are badly fitted and left unpainted. The fireplaces are left without ash pans, fenders and blowers. The hollow spaces behind iron mantels are not filled in. The fireplaces, hearths are laid without solid bedding. The sill of front window nearest to new adjoining building is one and three-eighths inches out of level.

“ *Third floor.*—The floor is three and five-eighths inches out of level, the lowest part being at new party wall. The hollow spaces behind iron mantels are not filled in, and the grate flanges are not closely fitted to iron works of mantels. The sill of front window nearest to new adjoining building is one and five-eighths inches out of level.

“ *Sundries.*—The zinc roof of rear building requires repairs; holes are visible therein, evidently made by falling bricks. The outside lining of rear wall is not properly flashed at point of junction with adjoining new building. The thirteen-inch brick fire wall at above-mentioned zinc roof was taken down, but not rebuilt in proper manner. The front roof down pipe is left incomplete. The joining and cementing of front at junction with new adjoining building is im-

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properly done. The second-story front gallery floor shows one-half inch fall at end nearest to new building, and three and five-eighths inches fall at the other end.

"In new party wall of fourth story of adjoining building are four window openings, and in fifth story of same are four windows and one twin window; all these windows have outside movable shutters attached. The front cornice side return of new adjoining building projects about two and one-half feet beyond outside face of new party wall.

"The restoration of building No. 15 Baronne street will cost the sum of two thousand two hundred and ninety-six dollars.

"Respectfully submitted.

(Signed)

"WM. FITZNER, *Architect.*

"*New Orleans, October 14, 1893.*"

On comparing the two reports, it will be observed that in the former the party wall was stated to be in good condition, with the exception of one crack of insignificant size, in the third story, and that the roofs, gutters, pipes, fireplaces, mantels, etc., were likewise, and that the floors of the first and second stories were level, and the front wall was straight and plumb, and the galleries in good order; while in the latter it is stated that the front of the building was badly damaged, cracked and torn up by the shoring, tying and bracing of same during the erection of the new building; that the store floor is three inches out of level, the second floor two and one-half inches out of level, and the third floor is three and one-half inches out of level—all three of the floors inclining to the side next to the new party wall.

To supplement and confirm the correctness of these two reports, Fitzner, and Tierney, a carpenter, were interrogated, and we extract the following from their testimony.

The former states, upon making an examination of the two reports, that they were substantially correct. In speaking of the condition in which plaintiff's building was left at the completion of the defendant's new building, he says, that the shoring was improperly done, pointing out that same was defective at the front corner where there was a large showcase. He says "the front came right over and pulled it from the other building." He says, that the defendant's contractor, originally, put in one line of shoring, and, finding that insufficient, he put in another line, about one month afterward,

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finding it "necessary to reinsure his first line of shoring." He says, that he ascertained that the floors were not level, by measuring them by means of a level.

That the front sill of the front window is thirteen inches out of plumb, and that the front gallery has scarcely any fall on one end adjoining the new building. "That," he says, "is the difference between them. That shows the amount of settlement; that is, 'the settling down on that end;' that is the settling of the new building which has 'carried the gallery down with it.'"

On cross-examination, he states that, when first examined by him, "the front wall was in good condition, * * * It did not bulge out. It was straight, and no cracks were visible, and (he) therefore concluded (that) the wall was in good condition."

That, in his opinion, it will be absolutely necessary that an entirely new front wall should be constructed for the plaintiff's building, and that the sides of the floors should be raised, so as to bring them up to a level. And he places the cost of the wall at about one-half of the damages claimed in this suit.

He states his theory to be "that the new party wall caused a depression of the earth upon which (the) sleepers rested."

"Q. Mr. Fitzner, do you mean to say, that the fact that the floors of Mr. Levy's building are out of plumb, is due to the settlement of the medical building party wall?

"A. Most undoubtedly.

"Q. If that party wall had settled to any appreciable extent, at all, would it not be evident in the medical building?

"A. No, sir; not in the medical building, none whatever. That is, if there was an unequal settlement it would; but it was an equal settlement," etc.

The summary of this witness' examination is, that, on account of improper shoring of plaintiff's front wall, it was practically destroyed and demolished, during the destruction, by the defendant's contractor, of the old party wall, and the construction of a new one, whereby the cost of a new front wall will have to be incurred, which will equal one-half the total sum claimed in this suit; and that, on account of inherent defects in the construction of the new party wall, a settlement has taken place of the new building, which has produced a corresponding depression of the floors of the plaintiff's building on the side adjoining the new party wall—all of which was

occasioned through the negligence, and want of due care and proper skill, on the part of the defendant's contractor and his employees.

An experienced engineer testified "that when he made an examination of the plaintiff's building before the construction of defendant's new one, he found the building to be old, but in good order. The walls were reasonably vertical, and its condition, generally, was a reasonably good one.

"That, after the construction of the new building, he found that the floors had settled; that is (they), were out of level, and the partition doors and door and window openings were more or less disturbed by the settlement." That is to say, "the settlement of the new party wall."

But, this witness states, that the work of demolishing the old party wall had been commenced before he made his examination, though it was still standing; and he admits that "there were some cracks visible." That "they were old cracks (which) had not increased for some time;" and that, "it was for that reason (he said) it was in reasonably (good) condition for an old wall."

He admits that he made no actual measurements; "not with an instrument (but) went through and used (his) eye in forming (his) conclusions."

He states that he visited the new building while in the course of construction, and "found the cracks in the building enlarged, and some new ones opening; that the old ones had opened to some extent, and some new ones had started."

"Q. Did you consider it made any material difference in the efficiency of the walls for the purposes of that building (that is) this increase in the old cracks?

"A. Well, it impaired it of course; that is, it is not as good a wall as it was before."

Another witness for the plaintiff, while describing the condition of the building of the plaintiff somewhat as those witnesses we have referred to had done, admits that the "comparative condition of the premises after the party wall had been built, and the work "of restoring the premises had been done," was equally as good as it was "before the party wall was demolished."

This witness was a tenant of the plaintiff, and occupied the premises in question as a place of residence both before and after the erection of the defendant's new building, paying sixty-five dollars per month rent.

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The plaintiff, as a witness in his own behalf, says that prior to the construction of the defendant's new building, his own was "in good condition (and) nothing the matter with it;" and that "the front wall was sound and solid." That at present there are "large cracks in the wall; some of them that you can put your hand in."

Several other witnesses were interrogated in behalf of the plaintiff, whose testimony, in a general way, corroborates the statements of the witnesses we have referred to, in several particulars.

On the contrary, the contractor, his employees, and others declare that the shoring of plaintiff's building was done in the very best possible manner, every possible pains and precaution having been taken therein.

The witnesses of the defendant, generally, state that the front walls of the plaintiff's building were naturally defective by "reason of great age." That "the mortar was bad and the brick was bad." That "they had no bond to it;" and one of them says that, in fact, one "could push them down."

One witness explains "bond" to mean "the bricks lapping over each other;" and, that the absence of a bond is a defective wall."

Another witness states that the foundation of plaintiff's building was very diminutive, about three feet in diameter or width.

The contractor of the defendant, as a witness, states that he made a careful examination of the premises before commencing the work of shoring up the walls of the adjoining premises, and found "the walls were old and cracked, and fissures running from about half way of the first floor gallery to the top;" and that he "found that the front wall was very old, and had considerable cracks." That "the windows were considerably out of level, and the floors sagged from front to rear in the centre—that is, from front to rear * * * from the stairway on the down-town side," etc.

That, "in securing the front wall, owing to its rotten condition (he) had to use extra shorings and extra clamps to (hold) the building up, in order to keep this front wall from falling out."

That he "had to take extra precautions on account of the condition of the wall; (as,) ordinarily, the usual wall requires only ordinary shoring, but, in this case, extra shoring and clamping were required."

He further explains, that he found the internal condition of plaintiff's wall very bad, indeed.

That, "in the first place, it was built out of red bricks of inferior character." That "the bricks were soft; what (are termed) salmon bricks; and, when the walls were taken down, the bond, instead of one brick lapping over another, they run straight for, probably, a distance of four feet, which rendered no tie to the front, at all."

He explains, that "the effect would be in the settlement of the front wall;" that is, the settlement "would shore itself, without making any effect on the side walls." That "there was not sufficient tie to keep the front with the side wall."

In conclusion, the following may be taken as a fair summary of this witness' testimony:

"Q. Was (the plaintiff's front wall) in as good condition when you left as when you began?

"A. In my judgment it was in better condition."

And, without going into further details, we may quote the following as the substance of the proof with regard to the settlement of the new building, viz.:

"Q. Mr. Van Horn, does the Medical Buildings show signs of having settled, at all, since it was erected?

"A. No, sir.

"Q. What would you say, that it had, or had not settled, from your examination of it?

"A. Well, there is a settlement always in it from the shrinkage of the mortar; but, it is so little, it amounts to no damage. Have been through the building several times, and examined the walls outside and the front wall and see no signs of cracks or fissures in the wall whatever, and judge from that there could not have been any settlement amounting to anything whatever.

"Q. If that building had settled appreciably would there be any (visible) effect on the sidewalk or Schillinger pavement in front?

"A. As a matter of course."

Other witnesses substantially corroborate this witness' statement, both in respect to the bad condition of the front wall of plaintiff's building prior to the demolition of the old party wall, and as to the settlement of the defendant's new building having been, practically, insignificant.

The whole testimony satisfies us that the complaint of plaintiff with regard to the negligence and want of skill and care on the part of the defendant, his contractor and his employees in the manner

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in which they demolished and, subsequently, reconstructed the party wall is not made out.

But, that in so deciding, we do not found our opinion upon the theory that the plaintiff or his witnesses testified falsely, rather upon the idea that the defects in the front wall of the plaintiff's building were latent and invisible upon superficial observation; hence the developments made in the course of the work presented an altogether different case from that which was, originally, supposed to exist.

Our conclusion is that the finding of fact by the judge *a quo* is, substantially, correct. We are of the opinion that the evidence fairly shows that the defendant's contractor and his employees used every reasonable precaution in shoring up the plaintiff's building before the work of demolishing the old party wall was commenced, and that in the course of the construction of the new party wall they were reasonably careful and circumspect in the manner in which they performed the work, and thus reduced the damage which the plaintiff as adjoining proprietor was bound to sustain to a *minimum*.

We are of opinion that the plaintiff carried the burden of establishing by a preponderance of proof, that it was through the negligence, carelessness or want of skill on the part of the defendant's contractor and of his employees that the front portion of the plaintiff's building was badly injured, as well as that the settling of defendant's new building caused the floors of plaintiff's building to incline toward the new party wall, to the plaintiff's great detriment and injury.

And we are equally of opinion that he has failed to discharge that burden of proof on each of the foregoing propositions.

The law of this case, as applicable to the facts before us, is well stated in *Heine vs. Merrick*, 41 An. 194, and from which we have extracted the following, viz.:

"In demolishing the old and building the new party wall, under the conditions fully proved in this case, the plaintiff exercised an absolute right conferred upon him by the law. Under the maxim '*Neminem lædit qui jure suo utitur*,' they were not bound to indemnify their neighbor for any inconvenience or injury necessarily occasioned by the exercise of the right. Such a work must necessarily incommode the neighbor. It can not be prosecuted without an entry upon and partial occupation of his premises. It must disturb his enjoyment and that of his tenants. It may give ground

State ex rel. Johnson and Britton.

for the annulment of his leases, or for a diminution of rents. It may prevent the renting of his property. It may injure him in many ways. But so long and in so far as these injuries are inseparable from the exercise of the right, the neighbor is bound to submit to them and can claim no indemnity therefor. Such is the well settled jurisprudence of France under like codal provisions. 5 Duranton, No. 381; 11 Demolombe, No. 406; 2 Aubry & Rau, 322; 1 Pardessus, No. 174. * * * But, on the other hand, plaintiffs are responsible for any exaggeration of these necessary damages, which, by any diligence, they could have prevented. They were bound by every means in their power to reduce to a *minimum* the injury and inconvenience occasioned to their neighbor; to occupy his property to the least extent and for the shortest time consistent with the exercise of their right, and to hasten by all practical means the completion of the wall and the restoration of the neighbor to the full enjoyment of his property.

"They were, moreover, bound at their peril, to replace the neighbor, at the end of the work, in a position equal in every respect to that which he occupied in the beginning, and to furnish him with a wall fit and adequate to support his building without injury."

In view of the evidence we feel safe in affirming, that all the requirements of the foregoing quotation have been fulfilled by the defendant, except and in so far as are enumerated in the reservations of the judge *a quo*.

Our learned brother of the District Court has given patient consideration to the law and evidence and has rendered a proper decree. Judgment affirmed.

No. 12,238.

STATE EX REL. DANIEL JOHNSON AND JACK BRITTON.

48 1405
104 240

Relief by *habeas corpus* will be refused in case it is developed by the proceedings to be an application of an accused person for a preliminary examination—neither the Constitution nor the statutes having conferred the power, or imposed the duty, on the Supreme Court, or the judges thereof, to act as committing magistrates.

ON APPLICATION for Writ of *Habeas Corpus*.

William L. Thompson for Petitioner.

State ex rel Johnson and Britton.

M. J. Cunningham, Attorney General, and Robert J. Perkins, Jr.,
District Attorney, for the State.

Argued and submitted October 8, 1896.

Opinion handed down October 10, 1896.

The opinion of the court was delivered by

WATKINS, J. Alleging that they were held in custody by the sheriff of the parish of Jefferson by virtue of an affidavit charging them with the murder of one John S. Prayther on the 17th of August, 1896, and a *capias* thereunder issued, and the present absence of the District Judge from the State, relators seek to be finally discharged therefrom, or granted their release on furnishing bond, insisting that theirs is a case coming within the court's original jurisdiction under the Constitution to grant relief by *habeas corpus*. Art. 89 of the Constitution.

But, in our opinion, their petition states no ground for the relief sought, considered on its merits.

The application is confessedly for a preliminary examination; and their averments are that, upon the evidence, when adduced, it will appear that no crime has been committed by them.

Neither under the provisions of the Constitution nor statutes of the State has this court, or the judges thereof, been charged with the duties of committing magistrates. Constitution, Art. 81 *et seq.*; Revised Statutes, Sec. 1010 *et seq.*

While it is true that the Constitution authorizes this court and the judges thereof to issue writs of *habeas corpus*, it is their province to determine the *method* in which and the circumstances under which, in any given case, such jurisdiction will be exercised.

In contemplation of law a preliminary examination of an accused person is to be set on foot upon the application of some judge or justice of the peace of the vicinage, and its province is to perpetuate the testimony *against* the accused. Revised Statutes, Sec. 1010.

It seems to our minds a perfectly clear proposition, that we would run counter to all precedent and authority to take up this case, hear the evidence and release the prisoners on bond, or discharge them, upon such evidence as might be presented by the relators within the scope of their petition.

State vs. Ramsey.

Neither the District Judge nor District Attorney of the district within which the parish of Jefferson is situated, has been made a party; and certainly the issue raised can not be contested and determined contradictorily with the sheriff alone.

The following cases are pertinent, and, in our opinion, applicable, viz.: *State ex rel. Vickers*, 47 An. 662; *State ex rel. Baumann vs. Sheriff*, 44 An. 1015; *State ex rel. Rice vs. Sheriff*, 40 An. 3; *State ex rel. Hunter vs. Sheriff*, 35 An. 605.

The petition, it is true, avers that the judge of the district is absent, but it does not show that he will continue to be absent for so great a length of time as to cause relators great injury, or submit them to injustice thereby.

Such averments would, in any case of this kind, be jurisdictional.

We are of opinion, upon careful reflection, that relief in the present form should be denied, reserving relators' right to preliminary examination according to law, or suitable application for bail.

It is therefore ordered and decreed that the rule *nisi* be discharged at relators' cost, and the relief prayed for denied, reserving their right to preliminary examination, or application for bail before the Judge of the District Court.

No. 12,242.

STATE OF LOUISIANA VS. NICK RAMSEY.

The court affirms the rule that the statement of observers, not participants in the act, the subject of investigation, are not admissible as *res gestæ*. Wharton's Criminal Evidence, Secs. 262, 263; 39 An. 472; 42 An. 996.

48	1407
50	596
48	1407
120	318

APPEAL from the Third Judicial District Court for the Parish of Claiborne. *Barksdale, J.*

M. J. Cunningham, Attorney General, *Charles P. Roberts*, District Attorney (*E. H. McClendon* and *L. E. Thomas* of Counsel), for Plaintiff, Appellee.

J. A. Richardson and *J. W. Holbert* for Defendant, Appellant.

Submitted on briefs November 7, 1896.

Opinion handed down November 16, 1896.

State vs. Ramsey.

The opinion of the court was delivered by

MILLER, J. The defendant appeals from the sentence for manslaughter. He relies on several bills of exception, but our view in respect to one of the bills is decisive of the case.

A witness for the State, present when the deceased received the fatal shot, passing from the room where the shot was delivered to the front room, stated to the persons who were there in answer to the question "What is the matter back there?" and stated that "Nick Ramsey had shot Jim Moffitt, and shot him down for nothing." This statement was permitted to go to the jury as part of the *res gestæ*, over the defendant's objection reserved by his bill of exceptions. *Res gestæ* refers to the conduct and declarations of the parties accompanying or closely linked to the act, the subject of investigation. Such declarations or conduct regarded as arising from or suggested by the act itself, and as the unpremeditated declaration or conduct of the moment, are admitted, because of that weight the law attaches to conduct and declarations under such circumstances. Manifestly, that which is said or done after the act, the subject of investigation, has not the sanctity the law accords to that done or said at the time of the act. Hence, the law excludes from *res gestæ* the narrative of a past transaction. 1 Greenleaf on Evidence, Secs. 108-110. On the relation in point of time between the act and the declarations referring to it, the authorities are variant. In some cases a brief interval between the act and the statement has been deemed sufficient to exclude the statement; in other cases of greater intervals, the statement has been deemed within the *res gestæ*. While time is an important test in ascertaining the *res gestæ*, it can not be said that the interval is to be measured by any fixed rule as to seconds and minutes. Rice on Evidence, 125; Wharton Criminal Evidence; State vs. Mollisse, 38 An. 381. In this case the statement was at no greater time after the shooting than was requisite for the party who made it to pass from the back to the front room. We say this much in reference to the question of time, because of the discussion on that point we find in the briefs. Again, it is urged on us that the *res gestæ* does not include the statements of those the brief terms third parties present at the time. In some of the authorities cited by the State on this point the statements of those present at the time were treated as participants. There are cases, too, in which declarations of parties

State vs. Griffin et al.

present, not involved in the act constituting the crime, have been admitted. *State vs. Moore*, 38 An. 66; *State vs. Horton*, 33 An. 290; *State vs. Corcoran*, 38 An. 949. We are not required to lay down the rule with respect to the declarations of parties present at the time not participants in the act. The decision, in our view, is controlled by the fact that in this case the declaration sought to be given in evidence was that of an observer, and announced his opinion of the guilt of the accused. It was not the narration merely of the fact itself, but the expression of his opinion as to its character. Under all the authorities it seems to us that statement was not part of the *res gestæ*. Wharton thus states the law: "Narrations of the transaction are inadmissible, unless admissions of the party charged * * * Comments and criticisms of observers can not be introduced as *res gestæ*. Such persons must be called and examined as to what they saw. Wharton Criminal Evidence, Secs. 263, 264. Other text writers restrict *res gestæ* to the statements of the parties or of those connected with them in the transaction. Roscoe, p. 23; 1 Bishop Criminal Law, Sec. 1087. Our courts have excluded such testimony. *State vs. Oliver*, 39 An. 471; *State vs. Riley*, 42 An, 993. The statement in this case was that of an observer. It announced his opinion. In either view his statement was inadmissible. He was on the stand and could have been examined as to all facts in his knowledge. His opinion was not evidence; it was for the jury to form their conclusion from the facts given in evidence. The admission of the statement entitles the accused to a new trial.

It is therefore ordered, adjudged and decreed that the sentence of the lower court be reversed and set aside; that a new trial be and is hereby granted the defendant, and that he be held in custody to stand and abide the result of said new trial.

No. 12,236.

STATE OF LOUISIANA VS. STELLA GRIFFIN ET AL.

Confession.—The hope of immunity (no promise of immunity having been made) is not such inducement as to make the confession inadmissible.

Conspiracy.—The proper foundation having been laid and the conspiracy sufficiently established, the act done by one in furtherance of the unlawful design, is, in law, the act of all, and the declaration of one of the accused, at the time of doing such act, is evidence against the others.

State vs. Griffin et al.

Charge of the Court.—Although it is made the duty of the court to instruct the jury not to base any presumption against the accused upon the ground that he has not chosen to testify; the defendant, may, in effect, waive the instruction.

Jurors on Voir Dire.—The information furnished to the District Attorney about the fairness and responsibility of certain jurors was not attended with circumstances of impropriety.

Name of the Deceased.—The proceedings were regular and the rulings correct, except in one particular—the principal was not informed by the indictment for the murder of what person he is accused, and the accessories before the fact are charged with having feloniously counseled and procured the homicide of a person not named or identified.

A PPEAL from the Fourth Judicial District Court for the Parish of Jackson. *Machen, J.*

M. J. Cunnningham, Attorney General, and *A. B. Hundley*, District Attorney, for Plaintiff, Appellee.

C. P. Thornhill for Defendant, Appellant.

Submitted on briefs November 7, 1896.

Opinion handed down November 16, 1896.

The opinion of the court was delivered by

BREAUX, J. The accused, Stella Griffin, as principal, Frank Johnson and Will Smith, as accessories, were indicted for the murder of John Griffin.

They were tried, found guilty without capital punishment, and sentenced to hard labor in the penitentiary for life. They prosecute this appeal.

Four bills of exception were reserved by them; a motion for a new trial and a motion in arrest of judgment was filed.

The first bill of exception was taken to the admission in evidence of the confession of Stella Griffin, made to A. J. Bell, a witness.

The facts as stated in the bill are that the witness, a newspaper writer, said to her that her first statement was not accepted as the truth by the public, and suggested that she should make a correct statement. The court certifies that after the District Attorney examined the witness, and the counsel for the defendant had cross-examined him touching the proper basis for the admission of the

confession, it was evident that the witness, prior to receiving the confession, informed the defendant that he was a newspaper man, who wanted a statement from her for publication. There was no violence used, no threats made and no inducement offered. On the contrary, he informed her that there was nothing he could do for her in the way of immunity from punishment.

Having heard the testimony upon this point, the court admitted the evidence.

It does not seem to us that the rights of the accused were prejudiced by the court's ruling admitting the confession in evidence.

There was no such inducement offered as destroys the voluntary character of confession.

The trial judge in whose presence the accused and the witness were, who must have considered the age, the surroundings, the circumstances and all the proof, was satisfied that the confession was voluntary. We can conceive of no reason why his ruling, admitting the confession, should be disturbed.

The second bill of exception was reserved to the court's ruling in admitting testimony, it is urged by the defendants, although no conspiracy was shown as required. The indictment sets forth a conspiracy.

The trial judge wrote a detailed statement of the facts showing the conspiracy charged; it is copied in the bill of exception and supports his ruling. No attempt was made to disprove the statement, which has every appearance of being correct. Sufficient foundation having been laid, the evidence consisting of the conversation of one of the accused, with the witness, out of the presence of the principal Stella Griffin, was admissible against all the parties to the conspiracy in matter of carrying out the common design. Archibold, 7th Ed., Vol. 11, p. 1058.

The third bill of exception was taken to the court's ruling on the motion for a new trial.

The first ground of the motion is that the court failed to charge the jury, that no inference was to be drawn from the fact that the defendants did not avail themselves of the right of testifying.

It is urged by the defendants, with some force, that Act No. 29 of the Acts of 1886, makes it the duty of District Judges to charge the jury not to base any presumption against the accused upon the ground that he has not chosen to testify.

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The court, unquestionably, should always instruct the jury as required by the statute cited, should the accused choose not to testify. The trial judge informs us, by statement in the bill of exception, that the request for a written charge was not seasonably made; notwithstanding that fact a charge was written and read to the jury to which no objection was offered, and that it was through oversight that he did not specially instruct the jury as required by Act 29 of 1886. He called upon counsel for the accused to know if he had any special charge or instruction. The counsel replied in the negative. The accused took the chances of an acquittal and made no objection prior to the application for a new trial.

There may be cases in which the objection here made would be of no avail to annul a verdict. Accused may choose to waive well-expressed rights. Whether there was a waiver in this case is not important to decide, for the case must be remanded on another ground.

The second objection urged, shown by Bill No. 3, has reference to the alleged suggestions and advice on the part of the clerk of the court to the District Attorney. There was nothing officious on the part of the former, and nothing improper on the part of the latter. He desired information in regard to jurors who would impartially discharge the duty devolving upon jurors.

The District Attorney was a stranger in the parish. The clerk had a large acquaintance. The information given about the fairness and responsibility of jurors, in compliance with the District Attorney's request, was legitimate and proper. The accused had no cause to complain.

The fourth and last bill of exception was taken to the judge's ruling in refusing to sustain the motion in arrest of judgment.

The following is an extract from the indictment setting forth the crime charged, with blank space as in the original:

"In and upon one John Griffin in the peace of the State then being did and there wilfully, maliciously, feloniously and of her malice aforethought make an assault upon him, the said John Griffin, and did then and there wilfully, maliciously and feloniously, and of her malice aforethought kill and murder
and the grand jurors aforesaid upon their oath aforesaid do further present that one Frank Johnson and Will Smith, late of the parish of Jackson, district and State aforesaid, before the commission of the

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aforesaid offence and felony aforesaid, the said Frank Johnson and Will Smith aforesaid did feloniously, wilfully, maliciously and of their malice aforethought counsel, procure and abet the aforesaid Stella Griffin to commit the aforesaid offence and felony at the time and in the manner and form as aforesaid."

The indictment is fatally defective. The statement that the accused feloniously and wilfully, and of her malice aforethought, did kill and murder, without inserting the name of the one murdered, does not amount to a charge of which the court can take cognizance.

The name of the person upon whom it is charged an assault was committed is mentioned, but no mention is made of the name of the person alleged to have been murdered. It is not sacramental that the name of the deceased shall follow the word "murder," but it is essential that pronouns be used, if the name is not repeated, to make it appear certain who has been murdered. The failure to insert the name, or to make it appear by sufficient averment who was murdered, is not a mere defect of form. Whenever the name of the one killed is known it is absolutely necessary to insert it, otherwise it is a ground for a motion in arrest of judgment. If the accused committed an assault upon the deceased, it does not follow that she was the one by whom he was murdered. She may have committed the assault, but he may have been murdered by another. To support an indictment for murder, the prosecution must prove that the prisoner killed the deceased. After sentence and judgment it must appear that the name of the deceased is stated in the indictment.

"An indictment must either state the name of the one killed, or that he was unknown to the jurors." Russell on Crimes, Vol. 1, p. 555.

We would not feel justified in affirming the judgment of the court. The cause must be remanded for a new trial.

It is therefore ordered, adjudged and decreed that the sentence and judgment of the court *a qua* be reversed, the verdict set aside, the indictment annulled and the case remanded for legal proceedings against defendants. They are remanded in custody subject to the orders of the District Court of the parish of Jackson.

 State ex rel. Anglade vs. Judge.

No. 12,235.

 STATE OF LOUISIANA EX REL. WM. ANGLADE VS. JUDGE OF THE
SECOND CITY COURT.

The relator, a debtor, against whom a judgment for money had been rendered, had a key of an iron safe in his possession containing property, the judgment creditor had pointed out for seizure. The former was ordered to produce the key and open the safe. After he had refused to comply with the order he was committed to jail for contempt.

Held—There was a method for enforcing the writ of *fi. fa.* (C. P. 762) other than by process for contempt.

The order committing relator to prison for contempt is declared void.

 ON APPLICATION for a Writ of *Certiorari*.

Sambola & Ducros for Relator.

Conrad G. Collins for Respondent.

Submitted on briefs November 2, 1896.

Opinion handed down November 16, 1896.

The opinion of the court was delivered by

BREAUX, J. A *fi. fa.* was issued on a judgment obtained against the relator.

The defendant in the present proceeding for writs of *certiorari*, appeared before the acting judge and made an affidavit in which he swore that to enable the constable to seize the property of the relator, an order of court should issue to compel him to open an iron safe which contained relator's property. The order applied for was issued. The constable's return upon the order shows that the relator refused to obey the order.

Auguste Anglade, the judgment creditor, sued out a rule against his debtor, against whom he had obtained a judgment.

The rule was made absolute and the debtor, who is the relator here, was committed to prison for contempt.

The relator herein alleging that it was not possible under the law to compel him, *quasi servum*, to render personal aid to the executive officer of the court, applied to this court for writ of *certiorari*, and

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e112 193

 48 1414
116 732

State ex rel. Anglade vs. Judge.

prayed to be set at liberty and to have the proceedings annulled and avoided. The order *nisi* issued upon relator's petition, directed the release of the relator from custody, fixed a time for hearing the application for the writ on the merits, and reserved to the plaintiff (in the court below who is defendant and respondent here) the right to have the chest in question opened, or to cause it to be opened by the constable, and to make a seizure of any of the defendant's property therein contained.

There are two interests to protect. Those of the creditor, who seeks to recover the amount for which he has obtained a judgment, and, on the other hand, those of the debtor, who can not be forced to the performance of acts not covered by the terms of the judgment.

The judgment was for money. The rights of the parties were determined by the decree. This covered all legal steps essential to seize and sell the property of the debtor.

But after a valid levy under an execution on the judgment (or in order to effect a valid seizure), the judgment creditor has no right to coerce the judgment debtor to produce keys and open iron safes, particularly when a valid seizure can be made without issuing process for contempt.

It was suggested in argument at the bar on behalf of the respondent that there are two modes of executing under a *fi. fa.* One by causing the sheriff or constable to break open the doors of the safe as authorized by Art. 762, C. P., and the other by the form of a rule for contempt as in the case here.

The former has the expressed sanction of law, while no authority that we have found sustains the latter.

The respondent has not supported his position on this point by reference to any authority applying.

We translate the following as supporting the view that the seized debtor can not be commanded to open the doors and iron safes.

Coercion is only legal when sanctioned by legislative will. *Bonnier Elements de Procedure*, p. 114.

Reasoning a moment by analogy:

Art. 1926 of the Louisiana Civil Code and Art. 1142 of the French Code are similar.

Interpreting this article, the French authorities have repeatedly decided that the action was for damages, in cases of an obligor's failure

State ex rel. Anglade vs. Judge.

to comply with his obligation "to do or not to do," and that no process should issue to compel performance by coercion (*par contrainte de corps*).

This court upon this point has reached the same conclusion. *Levine vs. Michel*, 35 An. 1121; *Laroussini vs. Werlein*, 48 An. 14-16.

In *State ex rel. Hero*, 36 An. 352, this court said: "It appears that our law does not authorize the enforcement of final judgments, much less of *ex parte* orders, directing the delivery of property, by process for contempt."

There is nothing in the judgment, being one for money, or, in the articles of the Code of Practice which will justify us in holding that the debtor must be held to the specific performance of anything.

Finally, the respondent urges that this application should be dismissed for the reason that a writ will not issue when there was remedy by appeal.

If the judgment sought to be enforced was taken by the defendant and respondent as the basis to determine the right of appeal, it had become final and executory. The possibility of taking a devolutive appeal would have answered no valuable purpose and would only have resulted in disappointment.

In such a case the rule of practice referred to relative to remedy by appeal instead of *certiorari* does not apply.

But, if the order of commitment alone is the basis, as we think it is not appealable, there being no amount involved. Again, this court has decided in regard to jurisdiction if "the order committing relator to prison for contempt was one which the judge was without authority to make, and therefore null and void, he is entitled to relief by *certiorari*. Citing *State ex rel. Liversey vs. Judge*, 34 An. 741.

In the present case we hold that the order committing relator to prison was not supported by authority, and therefore *certiorari* offered a relief within our jurisdiction.

It is ordered, adjudged and decreed that the orders *nisi* be made absolute, and the order committing relator to prison for contempt be declared void, and be set aside.

No. 12,229.

STATE EX REL. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
vs. JAMES A. MONTEGUDO, JUSTICE OF THE PEACE FOR THE
FOURTH WARD OF THE PARISH OF EAST BATON ROUGE.

A citation addressed to the president of a railroad corporation is an absolute nullity, and a binding and valid judgment can not be founded thereon. It should have been directed to the railroad company.

48	1417
50	673
48	1417
105	380
106	382

48	1417
118	495
118	493

48	1417
124	806

ON APPLICATION for Writs of *Certiorari* and Prohibition.

Farrar, Leake & Lemle and *Thomas J. Kernan* for Relator.

Respondent *in propria persona*.

Submitted on briefs November 2, 1896.

Opinion handed down November 16, 1896.

Opinion of the court was delivered by

WATKINS, J. The grounds on which relator seeks relief by *certiorari* are that the respondent rendered against it an absolutely null and void judgment for the non-appealable sum of twenty dollars in an action for damages, at the suit of Charles F. Ratcliff for the killing of cattle, said judgment being null because same was rendered without a legal citation upon (the relator) as required by law, and without the cause having been fixed for trial.

The petition does not specify in what respect the citation is informal or illegal; and the transcript of the cause in respondent's court shows that the judgment was rendered on default, subsequent to the service of citation, and after the case was set for trial. It also shows that notice of judgment was given prior to the issuance of execution.

But the citation was issued in the aforesaid suit, entitled *Ohas. F. Ratcliff vs. Yazoo & Mississippi Valley Railroad Company*, pending in the respondent's court, and is addressed to *Stuyvesant Fish, President* of Yazoo & Mississippi Valley Railroad Company, and was served "on the Yazoo & Mississippi Valley Railroad Company, defendant herein, by leaving the same at its office, corner of Howard avenue and South Rampart streets, in the hands of M. R. Spellman,

State vs. Scott.

its general agent in this city, the president and other officers being absent from the city," etc.

Counsel for relator states the law of his case to be that citation upon which the judgment was based was absolutely null and void, because same was addressed to the *president* of the company, and not to the defendant itself.

We make the following extract from counsel's brief viz.:

"Upon the first point it is only necessary to refer to Arts. 1077 and 179, Code of Practice, and to the case of *Jacobs vs. Frere*, 28 An. 625. where the court (p. 626) say: 'The judgment is null for want of citation. The Code expressly says that citation must be directed to the *defendant* * * * Admit that Olivier was Fuseller's attorney in fact, still, when *Fuselier* is sued, the citation must be directed to *him* and not to his agent.' "

We have examined and verified the correctness of the quotation and, as a consequence, must hold the judgment pronounced by the respondent to be an absolute nullity for want of a legal citation.

But this will not result in the dismissal of the suit of Ratcliff against the railroad company, but merely its continuance for proper citation, and service. And we will accordingly annul the respondent's judgment reserving his right to continue the aforesaid cause in keeping with direction given in our preliminary order, viz.:

"Without prejudice to plaintiff's right to proceed to judgment and execution on a proper citation."

It is therefore ordered and decreed that the judgment pronounced by the respondent in the case of *Charles F. Ratcliff vs. Yazoo & Mississippi Valley Railroad Company*, and herein complained of, be and the same is hereby declared absolutely null and void on the ground that the citation upon which it was based is illegal, not having been directed to the defendant; but without prejudice to plaintiff's right to proceed to judgment and execution on a proper citation—costs to be paid by the respondent.

No. 12,220.

STATE OF LOUISIANA VS. TOM SCOTT, JR.

Contradictory Statements.—A witness having testified that the accused was about to return the property to the owner; in order to answer the charge brought against the accused, by proving that he did not intend to steal the property.

State vs. Scott.

The circumstances of the alleged prior statement was first placed before the witness, with sufficient clearness, to identify the occasion referred to.

Held: that for the purpose of throwing discredit on the testimony of the witness, the question of the prosecuting officer was proper to show that she had on a former occasion made statements inconsistent with the evidence she had given.

A PPEAL from the Second Judicial District Court for the Parish of Bienville. *Watkins, J.*

M. J. Cunningham, Attorney General, and *A. J. Murff*, District Attorney, for Plaintiff, Appellee.

J. C. Theus for Defendant, Appellant.

Submitted on briefs November 7, 1896.

Opinion handed down November 16, 1896.

The opinion of the court was delivered by
BREAUX, J. Convicted of horse stealing the defendant appeals from the sentence and judgment of the court.

The grounds upon which the appeal is based is set forth in the transcript before us.

The mother of the accused was one of his witnesses. She testified on direct examination that her son, the defendant, was preparing to send the horse back to the owner.

For the purpose of laying the foundation for impeaching her testimony, the District Attorney cross-examined her as to the time, place and person by whom he expected to prove the inconsistency of her statement. The following was the question propounded by him: "Did you not tell J. B. Perry on Mr. Gilbert's gallery on the evening he found the horse, that your son was going to leave the country that night with the horse?"

She answered: "No."

In due time Mr. Perry was called to contradict and impeach the witness.

To the ruling of the court admitting the testimony of this witness, in answer to the question propounded, as before stated, the accused reserved a bill of exception.

State ex rel. Singreen vs. Judge.

The ground of objection is that the statement of the mother of the accused was not contradicted by the testimony of the witness Perry. But the fact is, that there was direct conflict between the two statements. The two accounts were substantially inconsistent. The first account of the mother as a witness having been admitted to prove the innocence of the accused, proof of her second statement contradicting the first, was relevant for the purpose for which it was offered, that is, to impeach her testimony.

The propriety of the mode of impeachment followed in this case is sustained by a number of decisions.

With the view of impairing the credibility of a witness, facts may be proved which would not be admissible, if directly offered to prove the guilt of the accused. The issue here relates to the veracity of the witness. Rice on Evidence, Vol. 111, p. 368.

The principle is clearly expressed in a number of decisions, that no witness can be asked on cross-examination any question not relevant to the issue, simply with a view to discredit by other evidence establishing the untruth of his answer. But it is not the case here; the question was propounded to the witness on the examination in chief, with the view of proving that the accused had not stolen the property. It was therefore permissible to show that the witness had not sworn truthfully in answer to the question propounded.

Evidence not admissible in the first instance may become so in matters subsequent.

The relation in which the witness stands to the accused must be considered.

The whole matter is largely within the discretion of the court. Best on Evidence, p. 638.

Judgment affirmed.

No. 12,217.

STATE EX REL. THOMAS B. SINGREEN VS. R. H. DOWNING, JUDGE OF
THE FOURTH CITY COURT OF NEW ORLEANS.

It appearing that an affidavit for the granting of a writ of provisional seizure is wanting the signature of the officer before whom it was made, same will not be treated as null and void, if it be immediately succeeded by an order for the issuance of the writ which is signed by the judge. For in thus granting the order the judge manifestly acted upon the faith of the proper oath having been administered.

State ex rel. Singreen vs. Judge.

If subsequent to the filing of a motion to dissolve the writ the judge should cause the blank space in the jurat to be filled out, *nunc pro tunc*, it would have the effect of merely causing the record to conform to the truth, the plaintiff having been actually and really sworn to the affidavit in the first instance, and the name not appearing as having been thereto signed.

A APPLICATION for Writs of *Certiorari* and Prohibition.

Louis P. Paquet for Relator.

Ernest T. Florance and *Joseph F. Walton* for Respondent.

Submitted on briefs June 27, 1896.
Opinion handed down June 30, 1896.

The opinion of the court was delivered by

WATKINS, J. The relator complains that in the suit entitled *Henry Meyer vs. T. B. Singreen*, No. 15,082, depending in respondent's court, he filed an exception and motion, through his counsel, to dissolve the plaintiff's writ of provisional seizure in said suit issued for rent, mainly on the ground that the signature of the respondent had not been affixed to the affidavit plaintiff had made for the issuance of the writ; and that after the said exception had been filed, thus attracting his attention thereto, the respondent illegally and wrongfully affixed his signature thereto as notary public to perfect and complete the record, and thus defeat his exception and motion to dissolve.

And his contention is that the action of the respondent in this particular was illegal and unwarranted, and entitles him to relief by means of our writ of *certiorari*.

Per contra, the contention of the respondent is that in the matter of said suit referred to, he administered to the plaintiff, Meyer, the necessary oath, and caused him to affix his signature to the act and jurat in his presence, and caused the seal of his court to be thereto attached. That being at the time, busily occupied with various matters, he accidentally and inadvertently failed and omitted to affix his signature thereto; that when his attention was attracted to this omission by the filing of defendant (relator's) exception, he proceeded at once to make the necessary correction by appending his

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signature as notary public to the affidavit *nunc pro tunc*, so as to make same conform to the facts, and that the truth might appear, viz.: that the affidavit had been sworn to by the plaintiff Meyer in his presence.

His contention is, that he was legally and fully empowered so to do, and that relator's charges are wholly groundless.

In *Lewis vs. Daniels*, 23 An. 170, our predecessors held that the non-appearance of the judge's signature to the *jurat* in obtaining a writ of injunction was a mere accidental omission, and that the signing by the judge of the order granting the injunction, which made special reference to the petition and affidavit, was one continuous act, and that the judge acted on the affidavit as having been made before him.

In *English vs. Wall*, 12 Rob. 132, it was held that the signature of the judge not appearing to have been signed to an affidavit for a writ of attachment, the order granting the writ having recited that the judge had read the petition and affidavit which immediately preceded the order, on the same paper, and the judge's signature having been affixed to said order, the attachment should be maintained.

In this court it appears that the respondent signed the order for the issuance of the writ of provisional seizure, immediately below the unsigned affidavit, as was the case in the instances above cited.

We are of opinion that these cases are strictly applicable, and applying same to the instant case, we must conclude that the affidavit complained of was good and valid in law, and hence the act relator complains of as illegal was but the placing of his signature *nunc pro tunc* to an affidavit which was actually and really valid without it.

It is therefore ordered and decreed that the preliminary writ herein granted be set aside, and the relief prayed for by the relator be refused at his cost.

No. 12,172.

B. LOWENSTEIN & BROS. VS. JOE D. GLASS ET AL.

The plaintiffs having, in a previous suit, judicially affirmed the legality and validity of a sale of goods to the defendant, for the purpose of obtaining a judgment against him for the price, and sustaining an attachment against the goods as his property, can not be heard, in a subsequent suit against the same

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defendant, to deny the existence of such a sale, on the ground of fraud and deception on the part of defendant, as vendee, for the purpose of defeating the prior and ranking attachments of other creditors, and recovering the goods themselves, notwithstanding the former suit has been in the meanwhile withdrawn.

In such case, the prior attaching creditors can successfully urge the former judicial admissions as an estoppel against the second suit.

A PPEAL from the First Judicial District Court for the Parish of Caddo. *Land, J.*

J. Henry Shepherd for Plaintiffs, Appellees.

Leonard & Randolph, T. F. Bell and F. G. Thatcher for S. Levy, Jr., one of Defendants, Appellants.

Argued and submitted June 4, 1896.

Opinion handed down June 30, 1896.

Rehearing refused November 30, 1896.

The opinion of the court was delivered by

WATKINS, J. This is a revocatory action for the annulment of a sale of goods and merchandise by the plaintiffs to the principal defendant, J. D. Glass, charging fraud, and for a decree annulling a sheriff's sale of the goods against certain attaching creditors of Glass to the extent that same had been identified prior to sale, with due notice to the said creditors.

The defence is a general denial coupled with a plea of estoppel, to the effect that the plaintiffs had first attached the goods now claimed, as the property of Glass, claiming the price, and can not be, subsequently, heard to assert the nullity of the sale of the goods *ab initio* and demand their restitution.

The plea of estoppel was overruled and a verdict of the jury rendered in favor of the plaintiff for goods identified of the value of fifteen hundred and ninety dollars and sixty cents, and from a judgment thereon based the defendant has appealed and the plaintiff has filed an answer to the appeal, and demanded that the judgment be increased to the sum of seventeen hundred and fifty dollars as the price for which the goods were originally sold.

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Considering the transaction with reference to the plea of estoppel the facts of the case appear to be that plaintiffs made a sale of goods to Glass, the principal defendant, in Memphis, Tenn., where their business domicile is situated, on the 16 of August, 1894; the sale being for the stipulated price of five thousand seven hundred and fifty dollars, to be paid on four months' time, or at an earlier date in consideration of discount being made.

Before the time for payment had arrived the entire stock of merchandise of Glass in the city of Shreveport, La., where his business establishment was situated, was attached by several of his creditors residing in Shreveport, the amount of their claims aggregating some twenty thousand dollars, and that being more than the value of his property.

Immediately afterward plaintiffs filed an ordinary suit against Glass upon their open account, representing the purchase price of the goods they had previously sold him, and praying for an attachment, caused the whole of his property to be seized, including the remaining goods of the lot they had let him have, and which remnant constituted part of his general stock of merchandise.

A few days later the plaintiffs voluntarily entered a non-suit, and caused their attachment to be released; and thereupon they instituted the present revocatory action against their former defendant and alleged debtor, Glass, and made the prior attaching creditors of Glass co-defendants, claiming to have identified and set apart from the general stock of merchandise which had been seized, about seventeen hundred dollars' worth of the goods which Glass had obtained from them.

The grounds on which the present suit is brought against Glass are that he obtained these goods in fraud, under wilfully false representations, and under false pretences.

That he made false representations to them with respect to his solvency and financial standing; and that amongst other things he made to them the statement that he had on hand a stock of goods worth twenty thousand dollars; that he discounted all his bills before they became due, and that he owed no debts he could not easily and conveniently pay.

That he bought no other goods upon terms of credit, and owned a sufficient amount of unencumbered real estate to satisfy all of his bills.

The plaintiffs allege, substantially, that they accepted Glass' statement as true, and made the sale and delivery to him of over five thousand dollars' worth of goods on the faith of same; whereas, in truth and fact those statements were absolutely untrue, and resorted to by Glass for the deliberate purpose of deceiving and defrauding them, having neither ability nor intention to pay for same, at the time.

But conceding these statements were correct and susceptible of proof, the plaintiffs are confronted with their solemn judicial admissions, made under oath in a previous suit against Glass, in which they affirmed, under oath, that he was indebted to them for the price of the goods which they had sold him, and demanded a judgment therefor; and they caused a writ of attachment to issue and a seizure thereunder to be made of the *very property*, amongst others, they now claim they never sold. These judicial averments and proceedings are now urged by the two attaching creditors of Glass, whose seizures primed and ranked those of the plaintiffs in said attachment suit, and who are made defendants in this suit, for the purpose of wresting said goods from their seizure and control.

Certainly these defendants have an interest in urging the estoppel of those judicial proceedings, as a means of protecting themselves from personal liability for the value of the goods claimed in this, as well as against their demand for their restitution in kind.

Plaintiffs are in the attitude of having, in the former suit, judicially affirmed the legality and validity of the sale of their goods to Glass, for the purpose of obtaining a judgment against him for the price, and sustaining their attachment against the goods as his property, and of asserting in this suit that the pretended sale of goods to Glass was a sham and a fraud on his part, and an absolute nullity as to them.

In treating of the election of remedies it is said in the American and English Encyclopedia of Law, that "an election is binding on the party making it, and he can not afterward pursue an inconsistent remedy, though full recovery was not had in the first action," etc. Vol. 6, p. 250, No. 4.

And under that heading the author cites the following cases, viz.: Buckley vs. Morgan, 46 Conn. 394; Bailey vs. Herocy, 135 Mass. 172; Maller vs. Tuska, 87 N. Y. 166; Rodermund vs. Clark, 46 N. Y. 854; Dibble vs. Sheldon, 10 Blatchf. 178.

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In *Neild vs. Burton*, 49 Michigan, 53, it was held that an election if binding, though the court had not jurisdiction of the cause of action.

In *Butler vs. Hildreth*, 5 Metcalf, 49, Chief Justice Shaw, speaking for the Massachusetts court, said:

“Then the question is, whether the plaintiff has waived his right to so avoid the sale, reclaim the goods and maintain an action in trover on the refusal of the defendant to deliver them, by the fact that before he commenced this action he commenced an action against the defendant, on the notes given for the goods, made the usual affidavit that the notes were due, and caused property to be attached to secure the payment of them. The action on the notes was commenced February 3, 1841, but was never entered; (and) the present action was commenced March 28, 1841. Upon this case the jury were instructed that if the plaintiff, at the time he sued on the notes, knew all the facts, as he did afterward when he commenced this action of trover, tending to show that the sale was fraudulent and void, it was to be considered in law as a ratification of the sale, and that in such case this action could not be maintained.”

The opinion of the court on this statement of fact declares:

“The assignee has an *election*, not of remedies merely, but of rights, but an assertion of one is, necessarily, a renunciation of the other. This results from the plain and very obvious consideration that the assignee can not affirm the sale in part and disaffirm it in part; if it is to stand as a valid sale, the property of the goods remains vested in the purchaser, and he remains liable for the price. But if the sale is avoided and set aside, it stands as if never made; the property may be taken possession of by the representatives of the creditors as if no sale had been made, and the purchaser ceases to be liable for the price. When, therefore, the assignee has made that election, is he receives or demands the price, it is equivalent to an express declaration that he does not impeach the sale, and has no claim to the goods,” etc.

Then the court, addressing its opinion to the question immediately before it, said:

“But we think that if the assignee commences an action against the purchaser for the price, and causes his property to be attached to secure it, this is a significant act, an unequivocal assertion that he does not impeach the sale, but by necessary implication affirms it. It is an act, too, deeply affecting the rights of the purchaser, whilst

it is an assertion of his own; and, if done with a knowledge of all the facts which ought to influence him in his election, it is conclusive."

Quite a similar doctrine is announced in *Cray vs. St. John*, 35 Illinois, 222, in which the court in disposing of a similar question employ this language, viz.:

"The appellant, as sheriff, so far represented the attaching creditors as to enable him to assert their rights in the suits they had commenced. * * *

"The creditors had their election to disaffirm the sales made by them on the ground of fraud, and invest themselves with the rights, and entitle themselves to the remedies the law affords in such cases; or they might affirm the sales and have the rights and remedies of other creditors.

"The commencement of the attachment suits was, at least, a *prima facie* affirmance of the sales and is a waiver of the fraud, and all rights resulting from it."

These decisions appear to be appropriate and authoritative, and we adopt their reasoning as conclusive in this case.

There is no averment in the plaintiffs' petition, to the effect that they had just made the discovery of the fraud, on the proof of which they relied for recovery, immediately previous to the filing of this suit; nor does it contain any disavowal of their full knowledge of the same, at the time they filed their attachment suit, which is grounded on a distinct charge of fraud. Hence it is plain that they are bound by the election of the remedy by attachment, and it must be regarded as a *prima facie* affirmance of the sale of the goods to Glass which estops and precludes their disaffirmance of same in the present suit.

Our conclusion is, that the plea of estoppel, urged by the attaching creditors whose seizures primed that of the plaintiffs, and who are made parties to this suit, should have been sustained and the plaintiffs' suit dismissed.

It is therefore ordered and decreed that the judgment appealed from be avoided and reversed; and it is further ordered and decreed that plaintiffs' demands be rejected at their cost in both courts.

Savings Bank in Liquidation.

“ Counsel for defendant in rule and appellant contend that the consideration as stated does not constitute a consideration under the laws of the State to divest title of the co-heirs of John W. Bailey in and to the succession of John Q. Bailey in 1845, and therefore their rights not having been taken away, any children that might have been born of them since that time have inherited such rights. In like manner that the rights of the children of John W. Bailey, in his wife's, their mother's estate, likewise exist for like reason. We are at a loss to find upon what authority the pretensions of the defendant in rule are based.”

We have included with the statement of facts an explanatory statement of counsel so as to give, as we conceive, an accurate view of the situation.

The question is made to turn upon the validity of a deed derived from John W. Bailey made in 1868; and it is alleged to depend upon two prior deeds executed in the city and State of New York—the contention on the part of plaintiffs in rule being that same are donations, while that of the bank commissioner is that they are common law deeds evidencing sales of the property.

The claim and pretension of the plaintiffs in rule, predicted upon the theory that said instruments are donations *inter vivos* in the estimation of our law, are that they are subject to revocation by the forced heirs of Bailey and the donors in said acts, and that the title by adjudication at public auction is questionable, and that they can not be compelled to accept it.

Accepting the theory of the counsel for the plaintiffs in rule as the correct one—but which we regard as open to very serious question—the fatal defect, apparent upon the face of the proceedings, is that there is no suggestion of their being *in esse* or *in posse* any forced heirs in whose favor such right of revocation exists or is likely to arise. Consequently we can not regard this case as presenting such a real, substantial issue as this court is called upon to decide. *Cui bono*. Our judgment would not free the title of any latent ambiguities or defects nor bind and conclude possible heirs.

We must decline to pass upon the issue tendered.

Judgment affirmed.

Wolf vs. Stewart.

No. 12,204.

JOSEPHINE WOLF VS. MRS. SALLIE S. STEWART.

In an action for damages the plaintiff was absolutely without a right of action for exemplary damages on the grounds stated.

As to the demand remaining the Supreme Court was without jurisdiction, *ratione materiae*.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Louis P. Paquet for Plaintiff, Appellant.

Henry P. Dart and *Benjamin W. Kernan* for Defendant, Appellee.

Argued submitted November 4, 1896.

Opinion handed down November 16, 1896.

The opinion of the court was delivered by

BREAUX, J. The plaintiff is appellant from a judgment dismissing her suit on defendant's exception of no cause of action.

The plaintiff was formerly the owner of both properties, that now owned by defendant and that of which she retains the possession.

When plaintiff was the owner of both lots she erected a wood fence, eight feet high on the boundary line of the properties. Subsequently she sold one of the properties to the defendant.

In the act of sale no reference is made to the fence.

The defendant, it is averred by the plaintiff, has illegally and without any right, added eight feet to the height of the fence, and she further avers that she has thereby suffered damages, for which she sues. The claim for damages, the plaintiff alleges, consists of seventy-five dollars, arising from the additional height to the fence, and two hundred and fifty dollars for repairs she had to make because of the alleged damage caused by this fence.

She, in addition, alleges the mental anguish occasioned by the additional height of the fence, for which she claims two thousand dollars "vindictive, exemplary and punitive damages."

The plaintiff, in reference to the first fence (eight feet high, on the

48	1431
108	698
48	1431
109	491

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boundary line, on the date she sold the adjacent lot to the defendant) alleges that it "answered all the purposes of a division fence."

On appeal before this court the defendant has interposed the plea of want of jurisdiction *ratione materiæ*, and alleged that plaintiff's claim is purposely fictitious, with the object of creating a *prima facie* jurisdiction.

This allegation is principally directed against plaintiff's claim for two thousand dollars, at which she has chosen to fix the amount of her damages for alleged mental anguish arising from the asserted "illegal, malicious and tortious conduct and act of defendant in erecting said additional fence and refusing to remove same, notwithstanding amicable demand and request."

It is manifest that under no circumstances can plaintiff recover that amount (two thousand dollars) on the allegations of the petition. The act alleged was not such as to cause mental anguish for which damages can be allowed. Adding height to a fence and the refusal to remove it, under the condition of things alleged, is not actionable, in so far as relates to the amount last stated. No aggravating conduct or act is alleged. The plaintiff by her allegation in this suit has limited her claim to actual damages.

As relates to the two thousand dollars claimed for mental anguish, the judgment of the District Court sustaining the exception was, in our opinion, correct. We have found no ground and can conceive no reason upon which plaintiff can possibly base a claim for any part of that amount.

In matter of raising the height of the fence, no insult, malice or indignity of any kind is alleged against the defendant.

Mental distress, in itself, is not one of the consequences arising from the raising of a fence on a division line.

The facts alleged in the petition must be taken as true, provided they are, in themselves possible. Their legal consequence is presumed to be denied.

In addition, the limited amount of actual damages claimed (less than three hundred and fifty dollars) gives rise to only one conclusion, that no amount can be due for mental anguish.

This brings us to the question of the jurisdiction of this court.

We do not think that the allegations as to the two thousand dollars in question are any more effectual and substantial in matter of jurisdiction than they are in matter of the exception of no cause of action.

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It is urged in behalf of the defendant in exception, plaintiff in the suit, that the motion to dismiss was filed after three days, and in consequence it was not in time.

Upon the ground of want of jurisdiction *ratione materiæ* it was not too late; without the motion it would devolve upon us to dismiss the appeal *ex proprio motu* and to leave the remaining issues to be considered by another tribunal having jurisdiction over the true amount involved and presenting serious ground for consideration. The amount in dispute is surely less than two thousand dollars.

Having decided, for the reasons stated, that plaintiff has no right of action for exemplary damages, we can not consistently assume jurisdiction, and decide questions touching the lesser amounts claimed.

The large claim is unreal; the true matter in dispute was below our constitutional jurisdiction.

Poree vs. Valische, 15 An. 292.

The appeal is therefore dismissed at appellant's costs.

No. 11,938.

GEORGE W. MCCONNELL VS. DAVID LEMLEY.

A member of a surprise party visiting the house of a friend for the purpose of spending an evening in social amusement, sustaining injury by means of a falling gallery.

Held: that she can not recover damages of the owner of the building, who had leased it as a place of residence to the friend whose house the party visited.

Revised Civil Code, Arts. 2322 and 670, must be construed together as laws *in per materia*; and being thus construed they exclusively relate to the injuries which may be inflicted by falling walls, or materials composing them, upon neighbors or passers by, and not to those resulting to occupants of the buildings, or guests therein assembled.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Frank E. Rainold and A. G. Brice for Plaintiff, Appellee.

James Wilkinson, R. H. Lea, and Farrar, Jonas & Kruttschnitt, for Defendant, Appellant.

48 1433
48 1440
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116 1107
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119 1031

McConnell vs. Lemley.

Argued and submitted March 11, 1896.

Opinion handed down April 6, 1896.

Rehearing refused November 16, 1896.

The opinion of the court was delivered by

WATKINS, J. Plaintiff seeks to recover ten thousand dollars damages of the defendant, as owner of the house at the corner of Julia and St. Charles streets in the city of New Orleans, it being at the time occupied as a residence, by one W. H. Burgess, as his tenant, under the following circumstances as related in his petition, viz.:

"On the 16th of November, 1894, Burgess entertained a party of friends at his home. They had come as a 'surprise party' and were welcomed by Burgess as guests. Among them was the daughter of plaintiff, and she was made welcome by the host and his wife. A little after 1 o'clock, Miss Virgie McConnell was standing on the veranda, or gallery, that surrounded the dwelling, and on which a number of doors opened. She had stepped upon the gallery for the purpose of enjoying the fresh air, as the evening was a warm one, while the other young ladies were putting on their hats preparatory to leaving. While she was standing on this gallery, which was a structure extending along both the Julia and St. Charles street sides of the house, being about twelve feet wide, with a railing encircling it, the fire bells rang and about a dozen of the guests came out to watch the fire engine pass. The engine house was nearly opposite, and they viewed the preparations of the firemen, and the departure of the engine out Julia street toward the woods.

* * * * *

"The engine had scarcely crossed St. Charles street before the section of the gallery upon which Miss McConnell, with about seven or eight other guests, was standing, suddenly gave way and fell, and precipitated her and others to the hard flag pavement of the sidewalk, a distance of about thirteen feet. Two others fell on top of her. Her right leg was broken above the knee, and she was bruised all over the body. She remained six weeks in bed in the Charity Hospital, suffering excruciating pains and agony; and she could not walk without a crutch for months after the accident. After healing, her injured leg was found to be shorter than the uninjured one. Dr. Schmittle, who had not measured the extent of the shortening,

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thought it was between one-quarter to one-half inch; Dr. E. J. Graner, who made a critical examination, testified that it was about one-half inch. Both physicians concur in pronouncing the injury permanent, and that Miss McConnell will be a cripple for life. She will always limp.

The cause of the falling of the gallery was fully proved. It was rotten to such an extent that no repairs could have rendered it safe. The inspector of public buildings of the city of New Orleans, Mr. Peeler, made an examination of that portion of the structure that did not give way, and ordered it torn down, as dangerous to human life."

Admitting his ownership of the premises in question and the lease of Burgess, the defendant, for answer, avers that it was rented for the uses and purposes of a residence, and was in thoroughly good condition at the time the accident happened; and that it was amply safe for its usual, ordinary and contemplated purposes. That there was no defect in said gallery which was apparent to an observer; and that he had effected all the repairs which were necessary a short time before the accident, and if any further repairs were desired it was the duty of the tenant to have notified him to make same, and in default of his so doing to have made same, and deducted the cost from the amount of rent due or to become due.

He denies that plaintiff's daughter went on the premises with the knowledge or consent of himself, or even with the request or at the invitation of his tenant. He avers that his tenant possessed and used the gallery daily, and had same been in the dangerous condition it is represented to have been, it would have been the duty of the tenant to have warned the young people composing the surprise party of the danger there was of crowding thereon, as they are admitted to have done. That the proximate cause of the accident and of the injury which was inflicted upon plaintiff's daughter, was the sudden rushing of the dozen of young ladies out upon the gallery simultaneously, same not having underneath any proper and suitable support, as is usual when it is expected to be resorted to by an unusual assembly of persons.

As matter of law, it was contended by the defendant's counsel that the precept of our Code, which provides that the owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it (R. C. C. 2322), applies only to

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passers-by upon the public highway, and to neighbors, and not to persons voluntarily entering upon private premises, and there suffering an injury.

That a person who thus enters the premises of another, by the permission of the tenant, is, with respect to the owner, a mere licensee, and sustains a relation to him somewhat like that of a sub-tenant, and can acquire no greater rights than the principal lessee; and if he enters without permission of the lessee, he is a trespasser, without any privity of contract with respect to the owner, through the medium of the lease.

That a tenant can not recover damages of the landlord by reason of his failure to make repairs, when the arrearages of rent are sufficient to enable the lessee to make them, in case of the lessor's failure to make same after he has received due notification of the necessity of same being made; and he avers that at the time of the happening of the accident the tenant was in arrears a sufficient amount to have defrayed the cost of the necessary repairs.

On the trial there was judgment for twenty-five hundred dollars against the defendant, predicated upon the verdict of a jury, from which he has appealed; and in this court plaintiff has demanded that this allowance be increased to five thousand dollars.

The proof at the trial substantially conforms to the foregoing statements *pro et con*.

It shows that shortly after he rented the premises to Burgess, the defendant sent carpenters to the leased premises, with instructions to place it in good order, and that materials were ordered and delivered for that purpose, and used by the carpenters. That all the repairs necessary were voluntarily made by the defendant, and that no demand was subsequently made by the tenant for additional repairs; that at the time of the accident the tenant was in default in making payment of his rent, and was subsequently notified to vacate the leased premises on account of his non-payment of rent. That the gallery was not in a condition to stand this unusual strain is not denied, but on the contrary, was generally known among the guests, and that during the course of the evening that the accident happened the visitors were warned and admonished to desist from dancing, as the gallery would not stand the strain it would produce.

That notwithstanding that warning the guests rushed out on the gallery when the fire-bell rang, causing it to give way and fall

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beneath their accumulated weight, causing the injury complained of to the plaintiff's daughter.

Plaintiff's counsel puts his clients's right of recovery upon the following provision of our Code, viz.:

"The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction." Revised Civil Code, 2322.

And the further provision, viz.:

"Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill." R. C. C. 2316.

These provisions of the Code treat of *offences and quasi-offences* toward the general public and they impose upon the owner of a building the general duty of keeping it in such a state of repair and preservation that it will not occasion damage to any one. And in case of his failure so to do they declare that he is answerable in damages to one who shall suffer injury in consequence of his neglect, imprudence or want of skill.

But counsel for the defendant contend that the article first cited must be construed in connection with the provisions of Art. 670, which are as follows, viz.:

"Every one is bound to keep his buildings in repair, so that neither their fall, nor that of any part of the materials composing them, may injure the *neighbors* or *passengers* under the penalty of all losses and damages which may result from the neglect of the owner in that respect." (Our italics.)

These articles have been frequently construed by this court, but in no case of which we are aware have they been applied to a case circumstanced as this case is.

They have been construed as applying to persons injured while walking along the street. *Howe vs. New Orleans*, 12 An. 481; *Barnes vs. Beirne*, 38 An. 280; *Tucker vs. Railroad Company*, 42 An. 114.

And they have been applied to persons occupying an adjoining building, who have sustained injuries by reason of another building falling against and demolishing it. *Knoop vs. Alter*, 47 An. 570; *Steppe vs. Alter*, 48 An. 363.

These are obvious and necessary safeguards the law has provided for the citizens of towns and cities, to whom old and dilapidated, or

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badly designed and constructed buildings are a constant menace, while attending to the ordinary and every-day concerns of life.

But it is not readily perceivable upon what principle of duty or equity these precepts of the Code are to be extended to the accidental occupants of a house, having no contractual relations with either the proprietor or his tenant.

But, it must be observed, that the articles cited do not rest upon contractual relations, at all; but the liability of the owner arises *ex delicto* alone.

He is held liable because he is deemed guilty of a fault in not keeping his building in such a safe condition as it will not do any member of the public an injury. It is the *thing* which offends, and the *owner* suffers the consequences of the offence. The imposition of the penalty results from the idea, that the faulty or defective building is an invasion of the security that municipal government guarantees to the citizen, or wayfarer in the public thoroughfare of the city.

The reason and spirit of this rule does not seem to apply to the person who seeks admission to the premises or who goes there upon the invitation of the owner or tenant, either on business or pleasure; for, in such case, the ordinary rules of trespass or contract would apply. Visitors are, in a certain sense, members of the family.

Looking at the evidence as we have related it, it is manifest, that if the members of the surprise party had passed along the banquette underneath the gallery of defendant's house, and had not entered the building at all, it would not have fallen, and plaintiff's daughter would have suffered no injury; consequently we must look to some different principle of law on which, if at all, the defendant can be held bound.

In our opinion the guests of the tenant have no claim against the landlord for damages they have sustained while on the premises.

The guests of the *tenant* are not guests of the *landlord*. During the term of the lease the owner may be said to have, for a consideration, parted with his exercise of the right of ownership. If the tenant be neglectful of the safety of his guests they have their recourse against him personally and not against the owner of the building. In such case it is the duty of care the occupant owes his guest and not the duty the owner of the building owes to the public, that controls the recourse of an injured party.

If on plaintiff's theory, a person, upon invitation of a tenant,

Prechter vs. Lemley.

should enter any old and dilapidated building and suffer injury, and the owner would be responsible, the consequences would be disastrous to landlords; for who could afford to lease property under the circumstances, and take the risk of suffering thousands of dollars in damages for the carelessness or imprudence of tenants on their failure to make, as in instant case, some trifling repairs, the cost of which he could have easily reimbursed himself from the arrearages of rent in his hands.

We are fully convinced that the article of the Code on which plaintiff's counsel rely was never intended to govern this kind of a case; and this becomes more evident when we take into consideration the article of the Code which counsel for the defendant has cited as being in *pari materia*.

Counsel has also referred us to several pertinent common law authorities, but we prefer to rest our decision upon the principles of our own statutes.

But if, on the other hand, the members of the surprise party were uninvited, and to be treated and considered as trespassers, or mere licensees, the plaintiff's only recourse must be against the person by whose tacit permission they were on the premises. O'Connor vs. Railroad Co., 44 An. 339; Snyder vs. Railroad Co., 42 An. 302.

But, in any event, the evidence satisfies our minds that the defendant, as owner of the building, has exonerated himself from liability by making all the repairs which he supposed to have been necessary to the safety and security of the building; and if any fault there was on his part, the tenant and his guests contributed, in some degree, to the accident, by not desisting from rushing out upon the gallery as they did after having been warned against the danger of dancing on it.

A case for damages is not made out.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the plaintiff's demands be rejected at his costs in both courts.

No. 12,086.

MISS LOUISE PRECHTER VS. DAVID LEMLEY.

The court adheres to the opinion in McConnell vs. Lemley, presenting same question. 48 An., p. 1433.

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A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Frank E. Rainold, A. G. Brice and T. J. Semmes for Plaintiff,
Appellee.

James Wilkinson, Farrar, Jonas & Kruttschnitt and R. H. Lea for
Defendant, Appellant.

Argued and submitted June 6, 1896.

Opinion handed down November 16, 1896.

The opinion of the court was delivered by

MILLER, J. This case presents the same issue as that determined in *McConnell vs. Lemley*, 48 An. p. 1433. In view of the importance of the question and the earnestness of the argument for plaintiff, in this as well as on the application for the rehearing in the *McConnell* case, we have given the subject a re-examination. In the light of our jurisprudence, meagre as it is on this question, and that afforded by the French authorities, we are constrained to adhere to our opinion in the *McConnell* case.

For the reasons assigned in the opinion in the case of *McConnell*, it is ordered, adjudged and decreed that the judgment of the lower court be avoided, reversed and annulled.

No. 12,207.

HENRY J. SCHMITT ET ALS. VS. CITY OF NEW ORLEANS.

The City Council of New Orleans, in its discretion, can provide for the paving, or the repairing of any street in the city of New Orleans.

The city is not compelled to return to the property holders the value of the old pavement which has been replaced.

The City Council, in locating a street railway, has the right to designate what part of the street it is permitted to occupy.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Joseph Maille and Gus A. Breaux for Plaintiffs, Appellants.

Schmitt et als. vs. City.

Samuel L. Gilmore, City Attorney (*Denégre, Blair & Denégre*, of Counsel), for Defendant, Appellee.

Farrar, Jonas & Kruttschnitt for Intervenors, Appellees.

Argued and submitted November 17, 1896.

Opinion handed down November 30, 1896.

The opinion of the court was delivered by

MCENERY, J. The City Council of New Orleans gave legal notice of its intention to cause the paving of Ursulines street from North Claiborne to Broad street, in order that the property holders, under Act 142 of 1894, might select, within the legal delay, the material with which the street should be paved, and the imposition upon them of the proportion of their assessments in accordance with said act.

The ordinance authorizing the pavement of the street, designated twenty-one feet as the portion of the street to be occupied by the tracks of the Orleans Railroad Company, which was about to reconstruct its tracks on said street, the paving to be on either side of the tracks of the said railway company.

The plaintiff property holders on said street enjoined the paving of the same. The advertisement for a contract had been made, and the contract entered into under a later ordinance, when the injunction was obtained.

There is no conflict as to the manner or mode of the contract, or the regularity of the proceedings of the council.

The objections urged are that the city had no right to designate neutral ground in the centre of said street; that it had no right to take up the cobble-stones on said street, and that the ordinance was illegal, the city having no right to order the repavement of a street. The street had been partially paved with cobble-stones. But we will assume that it was paved with cobble-stones from curb to curb in its full length. The city has full plenary power over the streets. This is explicitly delegated by the General Assembly in the charter granted to the city. We have so often stated that it is unnecessary to cite authorities to support

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the assertion, that the City Council, in the exercise of its control and supervision of the street, can designate the part to be occupied by a street railway company. In this case it designated the centre of the street to be occupied by the railway street company with its consent. And, we may state here, the acceptance of a new route, designated in place of a former one, will not relieve the company from its obligations to the city to keep the street in repair. The location having been selected at the request of the railroad, even if it should change from one street to another its obligations would remain unaffected by the authorized change, except perhaps, it might be in the abandonment of the old route, and a payment of a price for the new franchise. This is not made a matter of complaint in the part of the record brought here, but it is argued in the briefs.

The objection that the city has no authority to order the repavement of a street is totally untenable. The general power given to the city to control the use of the streets, to improve and police them, necessarily carries with it the authority to pave them. This can not be restricted to unpaved streets. To repave is to pave. The streets may become impassable from old and worn-out pavements, or those in existence, although they may be in good repair, may be of such character as to fall behind the improved methods of pavements, which modern comfort and convenience demand.

The city charter and the act amendatory thereto give the property holders on the streets the right to demand the pavement or repavement of a street, and thus force to action an inert and non-progressive city government.

Section 32 of the city charter accords to the property holders on a street, where one-fourth the number shall demand it, the paving of an unpaved street by the City Council. The City Council is without discretion to deny the demand. Sec. 33 accords the same right to property holders to have a paved street repaved.

In either case the council can not refuse to comply with the demand unless the same, after the publication has been made, is met with the opposition of a majority of the property holders. And in both cases the property holders have the right to designate the kind of material to be used in the paving of the street. Section 37 gives the City Council the power to order the pavement or repavement of any street. Its discretion can not be controlled, and it is beyond judicial power to interfere with it.

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The city charter provides for the action of the property holders when the Council fails to move in the paving of an unpaved street, or the renewal, or the putting down of a new pavement. Section 37 is but a reaffirmation of the City Council's control of the streets, and vests in it the power, "in its discretion," to provide for the paving or banquetting of any street or portion thereof at the expense of the whole city, and to force from the proprietors of lots fronting on the streets a specific local assessment.

The sections 32 and 33, which provide for the petitioning of property holders for paving unpaved streets, or renewing or repairing of pavements, impose the entire cost on the property holders, while Sec. 37, which empowers the council to move in the matter of pavement on its own motion, charges the cost of pavement to the entire city and the property holders on the paved streets.

Act 142 of 1894 has direct reference to Sec. 37 of the city charter. It applies to the pavement of streets which the council orders to be improved on its own motion and in its discretion. It is an amendment of Act 119 of 1886, which was an act to amend Sec. 37 of Act No. 20 of 1882, which is the city charter. The amendatory act makes only two changes in the amended act, and provides for the payment of paving banquettes and sidewalks, and gives to the property holders, a majority in number and measurement on the street, the right to designate the kind of material to be used. The City Council of New Orleans, in its discretion, has the power to order the pavement or repavement of any street in the city. Its discretion can not be controlled by judicial power, unless it should be so arbitrarily exercised as to demand that protection which all courts grant when positive and unnecessary injury is inflicted. But such is not likely to occur in the paving of streets and their improvement in other ways, which promote convenience, and comfort and health. The ordinance requiring the pavement of Ursulines street is valid, and the proceedings under the same are regular in all respects.

It is claimed by defendants that they are entitled to the value of the cobble-stones taken from the street. They have received the benefit of their value in the contract with the parties to whom it was adjudicated. The stones are to be reduced in size and used in the reconstruction of the street. It would be impractical for the city to dispose of the stones and to return to each property holder his proportion of the value. When they were placed in the street at the

 State vs. White.

cost of the property holders it was a contribution to the public, and they became the property of the city for the use of the public.

There is in the record a petition in the way of an intervention of the property holders, a majority in number and measurement, who oppose the demand of plaintiffs and join with the city in its defences.

This dispenses with the objection to the want of ninety days' time in which the majority of the tax property holders in amount and measurement have to designate the kind of material with which the street shall be paved.

Judgment affirmed.

 No. 12,223.

STATE OF LOUISIANA VS. BEN. WHITE.

When a juror after he has heard the case and retires, but before going into the jury room declares that he will convict or acquit the accused, in other words, that he will speedily agree on a verdict, without reference to the merits of the case, the verdict will be set aside.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Moise, J.

M. J. Cunningham, Attorney General; *R. H. Marr*, District Attorney;
John J. Finney, Assistant Attorney, for Plaintiff, Appellee.

Paul W. Roussel for Defendant, Appellant.

Submitted on briefs November 21, 1896.

Opinion handed down November 30, 1896.

The opinion of the court was delivered by

MCENERY, J. The defendant was convicted of manslaughter and sentenced to hard labor. He appealed. He relies upon a bill of exception taken to the charge of the trial judge and on a motion for a new trial.

The exception to the charge is that the trial judge dwelt upon particular facts in the case and gave an unfair and undue prominence to testimony of the only witness for the State. In his statement

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State vs. White.

appended to the bill the trial judge says he can not give his assent to the facts stated in the bill, and that there was no conflict in the testimony of all the witnesses as to who was the aggressor in the fatal affray. "That portion of the charge objected to presented to the jury, by way of illustration, a merely hypothetical case, without assuming any fact as proven or disproven."

His statement brings this case within the rulings of *State vs. Smith*, 11 An. 633; *State vs. Dennison*, 44 An. 136. In the bill of exception no testimony is brought up to show that any witness testified to a state of facts in opposition to the illustration given by the trial judge, or that his charge was based on the testimony of the State witness which had been controverted by other witnesses.

In these hypothetical statements it is the duty of the judge not to trench upon controverted facts, and so state the case that the jury may assume that a certain state of facts has been proved. But this from the judge's statement does not seem to be the case here.

The bill of exception in relation to the refusal to grant a new trial is based on the statement of a juror. It was shown on the trial of the motion for a new trial that one of the jurors had gone to the water closet. When he came out one of the deputy sheriffs said to him: "I guess this is good for all night." The juror, Switzer, replied: "Oh, no! I'll wind it up in a short while; one way or the other will suit me."

Any act of jurors clearly indicating a disregard of the solemn duty imposed upon them and a disregard of the solemnity of their oaths will be sufficient to avoid the verdict. When the juror was sworn the defendant had a right to believe that he would give him a fair and impartial trial from the testimony adduced on the trial. He could not expect that the juror would give no weight to the testimony and consult his own convenience and pleasure, and make it a matter of indifference whether he would convict or acquit the defendant, if in that way he could avoid the unpleasant confinement for a night in the jury room.

The juror may have reconsidered his declaration of indifference as to the manner in which the case was to be decided. But of this we can know nothing, and must accept his declared intention to acquit or convict, according as a vote either way would relieve him from jury duty and a night's confinement in case of disagreement.

The sentence and verdict are annulled and avoided, and it is now

 State vs. Reiz.

ordered that the case be remanded to be proceeded with in due course of law.

No. 12,227.

STATE OF LOUISIANA VS. LOUIS REIZ.

If a grand jury is impaneled on the first day of the term, and on the second day it is discovered that one of the jurors is disqualified, it is competent for the court to discharge him, and order an additional grand juror to be drawn from the list of the grand jury furnished by the jury commissioners for that term.

A PPEAL from the Eleventh Judicial District Court for the Parish of Acadia. *Dupré, J.*

M. J. Cunningham, Attorney General, and *R. Lee Garland*, District Attorney, for Plaintiff, Appellee.

Philip S. Pugh for Defendant, Appellant.

Submitted on briefs November 7, 1896.
 Opinion handed down November 16, 1896.
 Rehearing refused December 14, 1896.

The opinion of the court was delivered by

MCENERY, J. The defendant was indicted for grand larceny and convicted. He complains that the grand jury which found the indictment against him was illegally constituted.

When the grand jury was impaneled, one of the members was under indictment for selling liquor to a minor.

He was incompetent. *State vs. Thibodeaux*, 48 An. 600.

The trial judge on the next day, before the grand jury had transacted any business, discharged the incompetent juror, and substituted for him another from the list of grand jurors drawn for the term. His name was drawn from the box in which the names of grand jurors had been placed.

Section 4 of Act 89 of 1894 requires the jury commission to select

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twenty-four citizens, who shall constitute the list from which the grand jury is drawn to serve for the term for which they are drawn. These twenty-four citizens' names are placed in an envelope, sealed and deposited in the jury box, and put in the custody of the clerk. They are deposited with this official for service, if necessary during the term, in case of a disqualified juror, or in the event of the jury being reduced below the lowest number constituting a grand jury, to be drawn to supply the required number.

The discharge of those not needed to organize the grand jury did not have the effect of relieving them from further service if required.

The proper practice is to dismiss the disqualified grand juror and let the panel remain undisturbed, unless it be reduced below the required limit for the legal existence of the jury. *State vs. Causey*, 48 An. 897; *State vs. Jacobs*, 6 Texas, 99.

But the restoration of the full number from the list of grand jurors drawn for the term does not vitiate the findings of the jury, because it is legally constituted from those required to serve during the term of court. If it was competent for the court to cause the jurors to be drawn to keep the jury from falling below the required number to transact business, he could keep the jury up to the number as originally impaneled. *State vs. Jacobs*, 6 Texas, 99.

In the case of *Commonwealth vs. Burton*, 4 Leigh, 645, in a case similar in all respects to this, the court said: "In this case the grand jury as first impaneled was not legally constituted. If it had found the indictment the want of qualification in the member subsequently withdrawn, might, and no doubt, would have been pleaded in abatement; so that, if the doctrine contended for by the defendant should prevail, the swearing of a single unqualified juror would put an end to the business of the grand jury for the whole term."

In this State it might be that the panel could be reduced below the *minimum* number, and the court, if defendant's contention should prevail, would be powerless to transact criminal business. Such a contingency has been provided against by the selection of twenty-four citizens from whom the grand jury is selected, the names of the entire number being placed in the custody of the clerk to be drawn as occasion requires.

Judgment affirmed.

 State ex rel. City vs. Judge.

No. 12,233.

STATE EX REL. CITY OF NEW ORLEANS VS. GEORGE H. THEARD,
JUDGE DIVISION "E," CIVIL DISTRICT COURT.

The civil district courts in this State have no authority to restrain the execution of a criminal statute.

A court which has no jurisdiction of a cause, exceeds the bounds of its authority when it issues therein an injunction. It has no power to entertain a rule for contempt for the violation of such an injunction.

ON APPLICATION for Writs of *Certiorari* and Prohibition.

Samuel L. Gilmore, City Attorney, and *W. B. Sommerville*, Assistant City Attorney, for Relator.

Respondent Judge *in propria persona*.

Benjamin Armbruster and *Buck, Walshe & Buck*, for Gambrinus Benevolent Association, also Respondent.

Submitted on briefs November 2, 1896.

Opinion handed down November 16, 1896.

Rehearing refused December 14, 1896.

The opinion of the court was delivered by

MCENERY J. The Gambrinus Benevolent Association, through its officers, alleging that Act No. 18 of 1886, known as the Sunday Law, did not apply to said association in the sale of beer and refreshments at a picnic or festival, which it proposed to hold, obtained an injunction from the respondent judge, forbidding the Mayor and police of the city of New Orleans from interfering with said festival in the sale of beer and other refreshments.

The case was allotted to Division "D," Civil District Court.

The relators filed an exception to the jurisdiction of the court on 25th of August, 1896, and on the same day, but prior to the filing of this motion, the respondent judge granted a rule, ordering relators to show cause why they should not be punished for contempt for

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State ex rel. City vs. Judge.

alleged interference with the writ of injunction. The relators applied for and obtained writs of *certiorari* and prohibition and pray that the writ of prohibition be perpetuated.

The respondent judge urges as an exception that the plea to the jurisdiction had not been disposed of. We adhere to the doctrine so often asserted in our jurisdiction that relief can not be granted under our supervisory jurisdiction, in an application for writ of prohibition, until all remedies have been resorted to in the lower court.

State ex rel. Shakespeare vs. Judge, 40 An. 607.

But in this case a rule for contempt was issued, ordering relators to show cause why they should not be punished for violating the writ of injunction. This is made a matter of complaint in the application for the writ. Under the writ of *certiorari* the whole record is before us, and it is competent for this court to ascertain whether or not the rule was issued by the court for the violation of an order within its jurisdiction. State ex rel. New Orleans Gas Light Company vs. Voorhies, Judge, 37 An. 606.

This disposes with the necessity of passing upon the exception also urged by respondent that he had received no notice of the intention to apply for the writ. An application for the writ of *certiorari* does not come within the meaning of the rule.

Act No. 18 of 1886 is a criminal statute. The duty was imposed upon relator to see that the statute was executed. It was their duty to arrest all offenders against that statute. No court has the power by injunction to restrain the execution of a criminal statute. But the respondent judge says the law does not apply to the plaintiff in injunction. This is placing an interpretation upon a criminal statute that is within the jurisdiction of the Criminal Court.

In the case of Hottinger vs. City, 42 An. 630, it was said the courts of this State have no power to issue an injunction to prevent a municipal corporation from enforcing, by authorized judicial process, its police ordinances, penal in their nature, enacted for the promotion of the public health.

Much stronger, therefore, is the reason that no court can enjoin the execution of a criminal law of the State, or the officers upon whom devolves the duty, from enforcing obedience to the law.

The District Judge had no jurisdiction of the case, no right or power to issue the injunction, and, therefore, no power to issue the rule for contempt for violating the order.

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 State vs. McNally.

The relief prayed for in the contempt proceedings is granted and the proceedings of the District Judge in the rule for contempt are annulled.

No. 12,248.

STATE OF LOUISIANA VS. JOHN McNALLY.

The City Council of New Orleans has the right to designate the number of hours in which laborers and mechanics shall work on the public works of the city; but the City Council has not got the power to make the violation of an ordinance, regulating the number of hours in which laborers and mechanics shall be employed in the public works belonging to the city, a misdemeanor, as this is an indictable offence, one which the General Assembly alone can create.

A PPEAL from the Fourth Recorder's Court of the City of New Orleans. *Clement, J.*

Samuel L. Gilmore, City Attorney, and *James J. McLoughlin*, Assistant City Attorney, for the City of New Orleans, Plaintiff, Appellee.

E. C. Kelly for Defendant, Appellant.

Argued and submitted November 19, 1896.

Opinion handed down November 30, 1896.

The opinion of the court was delivered by

MCENERY, J. The City Council of New Orleans enacted the following ordinance: "An ordinance relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the city of New Orleans.

"*Be it Ordained by the Council of the City of New Orleans*, That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the city of New Orleans, or by any contractor or subcontractor upon any of the public works of this city, is hereby limited and restricted to eight hours in any one calendar day; and it shall be unlawful for any officer of the city government, or any such contractor or subcontractor, whose duty it shall be to employ, direct or control the services of such laborers or mechanics, to require or permit any such laborer or mechanic to

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work more than eight hours in any calendar day, except in case of extraordinary emergency.

"Be it further ordained, That any officer of the city government, or any contractor or subcontractor, whose duty it shall be to employ, direct or control any laborer or mechanic employed on any public works of the city, who shall intentionally violate any provision of this ordinance, shall be deemed guilty of a misdemeanor, and for each and every offence shall, upon conviction, be punished by a fine, not to exceed twenty-five dollars, or by imprisonment for not more than thirty days, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

"Be it further ordained, That the provisions of this ordinance shall not be so construed as to in any manner apply to or affect contractors or subcontractors, or limit the hours of daily service of laborers or mechanics engaged upon the public works of this city for which contracts have been entered into prior to the passage of this ordinance.

"Adopted by the Council of the city of New Orleans, February 25, 1896.

"Approved February 28, 1896."

The defendant was charged with violating this ordinance, and convicted in the Recorder's Court. He has appealed, and attacks the legality and constitutionality of the ordinance on the ground that it violates Art. 46 of the Constitution of the State, and also that independent of said article the city is without power to enact said ordinance. This defence would, undoubtedly, be good if the ordinance applied to the regulating of the hours of labor generally within the city limits.

But the ordinance only regulates the hours of labor on the city public works. The city has the absolute control of its own property, and can regulate the hours of work to be employed on the same.

The ordinance violates no law so far as it designates the number of hours in which laborers may be employed on public works. Having this right over its property, it has also the right to enforce, by appropriate legislation, the violation of the ordinance fixing the hours for work on city buildings. But such an enforcement of the ordinance must be within the powers delegated to the municipality. It can not trench upon the rights of the State and invade the domain of its legislative department.

 Moore vs. City.

The ordinance creates the offence of misdemeanor.

The word is generally used to denote an offence in contradistinction to felony, comprehending all indictable offences below felony, but does not include offences over which magistrates have exclusive summary jurisdiction. The State of Louisiana has never made the offence criminal and indictable, and the city is without authority to make that an offence which the State has failed to do.

That part of the ordinance describing the offence and making it a misdemeanor is null and void.

The judgment appealed from is avoided and reversed, and the defendant ordered to be discharged.

 No. 12,245.

MRS. CHARLOTTE M. MOORE, WIDOW, VS. CITY OF NEW ORLEANS.

A manufactory not operating five hands usually and customarily is not exempt from taxation under Art. 207 of the Constitution.

A PPEAL from the First City Court of New Orleans. *Richardson, J.*

James B. Rosser, Jr., for Plaintiff, Appellant.

Samuel L. Gilmore, City Attorney, and *James J. McLoughlin*, Assistant City Attorney, for Defendants, Appellees.

Argued and submitted November 19, 1896.

Opinion handed down November 30, 1896.

The opinion of the court was delivered by

WATKINS, J. Plaintiff's claim is that the property in controversy is exempt from taxation, State and municipal, on the ground that it is employed in the manufacture of machinery within the sense and intentment of Article two hundred and seven of the State Constitution; and that, consequently, the assessment thereof for the year 1895 was illegal, null and void, and should be annulled and abated, and her property declared exempt.

Entertaining a different view, the judge of the city court denied

Moore vs. City.

plaintiff's application for relief, and rendered judgment in favor of defendants, maintaining the legality of the assessment, and the former has appealed.

The following is a statement of facts upon which the case was tried in the lower court, viz.:

"That the plaintiff has succeeded to and conducts the business, lately conducted by Charles Moore, known as Moore's brass foundry, on the premises designated as lot No. 19 of square 123, in First District, in square bounded by Constance, Tchoupitoulas, Julia and St. Joseph streets, measuring twenty-five feet front on Tchoupitoulas street by one hundred and seventy-two feet deep, of manufacturing brass faucets, cocks and other articles of brass, besides casting and manufacturing iron castings, iron shafting and connections, iron piston rods and other similar articles of iron. That when said manufactory or foundry is in full operation not less than five hands are employed, but that five hands are not constantly employed, and frequently not more than two, or three, or four.

Confining our attention to this statement, do the facts recited make out a case of exemption under the terms of the Constitution?

The two essential requisites of the Constitution are, *first*, that the plaintiff should be engaged in manufacture, and, *second*, that her manufactory is engaged in manufacturing machinery.

But in addition to these requirements there is a very important proviso to the effect "that not less than five hands are employed in any one factory."

In *Benedict vs. City*, 44 An. 793, we held it to be essential to exemption under Art. 207 of the Constitution, that the proof should show that the property claimed to be exempt was in *operation* as a manufactory; and in *Behan vs. Board of Assessors*, 46 An. 870, a similar principle is announced.

In the agreed statement of facts it is said "that when said manufactory or foundry is in *full operation* not less than five hands are employed; but that five hands are not *constantly employed*; and *frequently not more than two, or three, or four.*" (Our italics.)

This admission is, in our opinion, fatal to the plaintiff's alleged exemption. It clearly shows a want of full compliance with the proviso to said article "that not less than five hands are employed in any one factory."

To be within the exemption the proof should show that not less

State vs. Collins.

than five hands were usually and customarily employed in the manufactory. And inasmuch as the admission is made that plaintiff's manufactory was frequently operated with not more than two, three or four hands, it had just as well to have been idle, in so far as its operation as a manufactory was concerned, during a large portion of the time.

It is a maxim consecrated in many decisions of this court interpreting this article that tax exemption is the exception and taxation is the rule.

We think the judgment is correct and it is affirmed.

No. 12,262.

STATE OF LOUISIANA VS. ARTHUR COLLINS.

A motion to quash a *venire* must be filed on the first day of the term at which the indictment is found, or exceptional circumstances shown which rendered compliance with the rule of law impracticable.

The object of this rule is to speed the administration of justice, and it must be rigidly enforced, except in cases of great urgency, and when enforcement would operate injuriously to the defendant.

A PPEAL from the Eleventh Judicial District Court for the Parish of St. Landry. *Dupré, J.*

M. J. Cunningham, Attorney General, and *R. Lee Garland*, District Attorney, for Plaintiff, Appellee.

W. S. Frazee and *C. F. Garland* for Defendant, Appellant.

Argued and submitted November 21, 1896.

Opinion handed down November 30, 1896.

The opinion of the court was delivered by

WATKINS, J. The defendant was indicted for the crime of murder, found guilty of manslaughter and sentenced to imprisonment in the penitentiary for a term of ten years, and from that verdict and sentence prosecutes this appeal, relying upon two bills of exception, one of which was taken to the ruling of the trial judge overruling his motion to quash the *venire*, and the other to his refusal to permit the introduction of certain testimony.

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I.-

The motion to quash the indictment was grounded on the complaint that the clerk of the court had failed to publish the list of the jury, as drawn from the ensuing term of court, in conformity with the requirements of Sec. 5 of Act 99 of 1896; and further, because the jury commission by whom the *venire* was drawn was illegally constituted, for the reason that one of the jury commissioners who participated in the drawing of same was at the time of his participation a duly qualified and acting member of the police jury for the first ward of the parish of St. Landry, having been theretofore elected to said office at the general election held on the 21st of April, 1896; and further, because another of the said jury commissioners was at the time of his participation in the drawing of said *venire* an officer of the United States government, and that, on that account, neither of said persons were qualified to act in the discharge of the duties imposed upon them by law as jury commissioners, and the *venire* as drawn was illegal, and that its illegality necessarily draws to it the nullity of the grand jury selected therefrom, and by whom the bill of indictment against the defendant was found.

This motion was denied by the trial judge mainly upon the ground that it came too late, not having been tendered and filed on the first day of the term of court at which the grand jury was drawn and organized, but was only filed several days subsequent to the commencement of the term and the organization of the grand jury.

The contention of defendant's counsel is, substantially, that he is exempted from the operation of the statute which requires the filing of a motion to quash a *venire* on the first day of the term, by reason of the fact that the grand jury did not find and report the indictment against him until after the lapse of several days subsequent to the commencement of the term, thus rendering it impracticable for him to file such motion on the first day of the term; but the contention of the State is that while that statement is literally correct, yet the defendant committed the homicide for which he was subsequently indicted on the 15th of August, 1896, and was preliminarily examined upon a charge of murder on the 26th of August, 1896, and remanded to jail without the benefit of bail, and thus remained in confinement until the court was convened in September following, when the indictment was found and he was arrested thereunder;

and that he was thoroughly admonished of the necessity of examining the *venire* and the manner in which it was drawn and of filing by anticipation the necessary motion to quash same upon the first day of the term.

The statement of facts furnished by the trial judge conforms to the foregoing contention on the part of the State.

Undoubtedly there are exceptions to this rule, and cases have been presented in which exceptions thereto have been recognized—for instance, in *State vs. Ashworth*, 41 An. 683, in which we held that a motion to quash a *venire* must be filed on the first day of the term at which the indictment is found, or “exceptional circumstances shown which rendered compliance therewith impracticable.” See also *State vs. Vance*, 31 An. 399; *State vs. Sterling*, 41 An. 679.

But there is nothing in the defendant’s motion to exhibit the existence of exceptional circumstances rendering compliance impracticable. There is nothing to show that defendant and his counsel were unaware of the alleged nullities in the drawing of the *venire*, or the want of qualification of the jury commissioners at the commencement of the term, or that they could not, in the exercise of ordinary diligence, have ascertained the existence of same, and on that account have filed his motion on the first day of the term.

There is nothing to the contrary stated in *State vs. Taylor*, 43 An. 1131.

In *State vs. Vance*, 31 An. 398, the defendant was indicted for an offence committed after the first day of the term. In *State vs. Texada*, 19 An. 436, the offence charged was committed on the first day of the term. But in *State vs. Thompson*, 32 An. 879, the motion to quash the *venire* was made *before* the organization of the grand jury by a defendant who was afterward indicted by them.

In a recent case the *rationale* of the requirement of the statute is thus given, viz.:

“The requirement of the statute, that a motion to quash a *venire* for supposed defects in drawing juries, shall be made upon the first day of the term, is to secure the prompt administration of justice, and with that view to prevent the holding back of motions of this character, preventing alleged irregularities of this character easily corrected without serious delay or expense, if made at the beginning of the term. If the statute should be relaxed when the indictment

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is found after the time, as was the case here, although the accused was in custody and represented by counsel, cognizant of all the facts on which the motion to quash the *venire* was based, still the motion should not have been delayed until the 30th of March, ten days after the term began, and the day had been fixed for the trial. In any view we hold it to be too late." State vs. Leftwich, 46 An. 1195.

That was a case of murder and the defendant had appealed from a sentence of death.

The reasons favoring adherence to the rule of the statute are quite as strong in this case. The court convened on September 1, the indictment was returned into court on the seventh, and the motion to quash was not filed until the fourteenth—though the cause had not been set down for trial at the time of the filing.

Manifestly, there was no occasion for this delay; and to treat the motion as having been timely filed, under the circumstances, would be an unwarrantable infraction of the rule, resulting very injuriously to the public weal. This we are unwilling to do. We therefore approve of the ruling of the trial judge.

II.

With reference to the second bill of exceptions we make the following extract from the brief of defendant's counsel, viz.:

"When the State had closed its case the defendant placed on the stand the witness, Ludger Lastrapes, and asked him the question, 'Do you know Alphonse Collins?' to which he answered, 'Yes, sir.' He was then asked, 'Has he ever gone by any other names?' which question was objected to by the State and sustained by the court.

"Alphonse Collins was the only State witness to the shooting, and in his cross-examination by the defendant in his examination-in-chief, he was asked if he did not go under several names; he answered, that if any one called him by any other he was not aware of it.

"Defendant proposed to prove by witness, Lastrapes, and others, that this State witness, Alphonse Collins, had worked for them and had given them other names than that of Alphonse Collins.

"The purpose of this testimony was to contradict the testimony of Alphonse Collins; to impeach his credibility as a witness, and to show to the jury his character.

 Building and Loan Association vs. Church.

"We think the lower judge erred in sustaining the objection of the State."

The difficulty is, that the statement which defendant's counsel proposed to prove was irrelevant to the matter at issue, and it was not competent for the defendant to attempt to contradict or impeach the truthfulness of a State's witness by the employment of such immaterial things.

There ought to be some connection between the matter at issue and the testimony offered; and, in our conception, the truthfulness of the witness would not have been impaired or his credibility successfully assailed if the testimony objected to had gone to the jury.

This objection is not well founded.

There is no error apparent, which entitles the defendant to relief at our hands.

Judgment affirmed.

 No. 12,167.

THE MUTUAL LOAN AND BUILDING ASSOCIATION VS. THE FIRST AFRICAN BAPTIST CHURCH.

The court again affirms that no grace is allowed on extensions of time to file records of appeal.

The right to dismiss the appeal not filed in time is not lost by the lapse of three days from the date of filing. The three days' rule has no application when the ground to dismiss is failure to file the record on the original or extended return day. 47 An. 1534.

Nor is such right at all affected by an order extending the return day made on the *ex-parte* application of the appellant after the return day has passed. 4 An. 350; 10 An. 76; 47 An. 1534.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Henry P. Dart and Benjamin W. Kernan for Plaintiff, Appellee.

Albert Voorhies and Henry J. Rhodes for Third Opponent, Appellant.

Argued and submitted November 18, 1896.

Opinion handed down November 30, 1896.

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Building and Loan Association vs. Church.

The opinion of the court was delivered by

MILLER, J. This appeal was returnable on the 4th of May, 1896. On the 5th, before the expiration of the three days' grace allowed by law, an extension of thirty days was allowed to file the record in this court. That delay, by the terms of the order granting it, begun from the date of the order, not from the 7th, the end of the grace period, as contended for by the appellant. There was another extension of sixty days granted on the 4th of June. The record was not filed within that delay, and on the 4th of August, one full day over the sixty days, another extension was granted, and still another afterward, within which, on the 10th of August, the record was filed.

The ground to dismiss is, that the appeal was lost by the failure to file the record within the sixty days from June 4. This seems to be fatal to the appeal. Sixty clear days had elapsed from the date of the June extension. It is settled that no days of grace are allowed on extensions of the return day. The subsequent extensions on the applications of the appellant could not revive the appeal. *Hudson et al. vs. Sheriff et al.*, 47 An. 1534; *Succession of Gast*, 42 An. 91; *Succession of Quin*, 37 An. 391; *Chretien vs. Poincy*, 33 An. 131; *Centennial Exposition vs. Railroad Company*, 38 An. 905; *Holz vs. Fishel*, 40 An. 294.

Nor is the appellant prejudiced by the fact that his motion to dismiss was not made until the 10th of November. When the period for filing the record goes by, the appellee is not required to notice the date of the subsequent filing and move to dismiss within three days. The rule that motions to dismiss must be made in three days has no application to motions of this class. *Dwight vs. McMillen*, 4 An. 350; *McDonogh vs. DeGruys*, 10 An. 76; *Hudson et al. vs. Sheriff et al.*, 47 An. 1534.

We are reluctant to dismiss appeals, when, as in this case, there appears to be an earnest controversy, but in the circumstances we have no alternative.

The motion of appellees is maintained, and the appeal in this case is dismissed at appellant's costs.

Baldwin, Receiver vs. McDonald.

No. 12,212.

JOHN P. BALDWIN, RECEIVER, VS. JOHN S. McDONALD.

1. The transfer of property by the insolvent debtor, alleged to be in fraud of creditors, will not be set aside merely and only because the transferee is a creditor, and the indebtedness, the consideration of the transfer. If under the circumstances the transfer was to the advantage of the creditors, or at least not injurious to them, the transaction is not within the scope of the revocatory action, one of the elements required in that action being injury to creditors. Civil Code, Arts. 1968, 1970, 1978, 1984; 18 La. 383; 14 La. 822.
2. If such transfer fulfilled the obligation resting on the debtor before and at the time of his insolvency, there is no room for the revocatory action.
3. The court adverts to the line of decisions that deny to syndics the right to disturb *bona fide* transactions of the insolvent, for informalities or such defects as non-delivery in contracts of sales; defects which the insolvent could not urge. 9 An. 539; 5 An. 274; 37 An. 472.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Benjamin Rice Forman and Hugh C. Cage for Plaintiffs, Appellants.

J. R. Beckwith for Defendant, Appellee.

Argued and submitted November 17, 1898.

Opinion handed down November 30, 1898.

The opinion of the court was delivered by

MILLER, J. The plaintiff, as commissioner of Leeds & Co., Limited, brings this revocatory action to set aside a transfer of property by the company to the defendant, the petition containing the allegations of the insolvency of the company, that defendant was their creditor with knowledge of the insolvency and of injury to the creditors. The defence is the general issue, with the additional averment that the property transferred was covered by patents to defendant securing to him the exclusive use and to the delivery of which he was entitled. The judgment was in defendant's favor, and plaintiff appeals.

The defendant was the patentee of an attachment to sugar mills for the separation of the juice of the cane. Leeds & Co. were

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machinists, with a contract to manufacture for the defendant the patented machinery to be taken and paid for by him, as well as sold by them when opportunities offered. To secure prompt execution of orders for machines, the work of the company was generally or often done in anticipation of orders from planters, and the result was the machines or castings and other parts of it were ready for prompt delivery when orders came for the machine. This led, as we gather from the record, to a course of business by which the company anticipated payment for their work before the machines were ordered, or at least before the price was realized, and the defendant would practically make that payment in advance. The company would obtain defendant's notes for amounts assumed to be coming to them from work in hand, or to be done under anticipated orders for the attachments. The notes thus given the company would discount, and at maturity the notes would be taken up by defendant. The president of the company testifies the notes were deemed pre-payments for the work of the company in constructing defendant's machine or part of it. It seems, too, that in delivering the machines or orders the company would collect from the purchasers, and in this way money of the defendant came into their hands. In this course of business the company had collected four thousand dollars of defendant's royalties, and besides the defendant had furnished them his note for twenty-five hundred dollars, which at maturity he had taken up, aggregating sixty-five hundred dollars. The company becoming insolvent, a few days before the seizure of the property and the appointment of liquidating commissioners, agreed to deliver to defendant the castings and portions of machines on hand they had made in anticipation of orders, the delivery to discharge to the extent of the value of the property the liability of the company for the money they had collected for defendant and for the amount of his note on which they had realized. Under this agreement the delivery was made by the commissioners acting for the company before the appointment of the plaintiff.

The plaintiff insists that this delivery of the patented machines or portions of it, made for the defendant under the course of business shown by the record, is to be viewed as the prohibited transfer of the insolvent debtor to his creditor. Civil Code, Arts. 1970, 1978, 1984, 2658 *et seq.* The defendant's contention is that the property delivered, covered by his patents conveying his exclusive

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right to sell, was of no use or value to any but himself; that the creditors were benefited, not injured by the transaction, and having the right under the method of his dealing with the company to demand the property, the delivery merely fulfilled the obligation of the company.

The law forbids the giving in payment to the creditor of the property of the insolvent debtor, the creditor knowing of the insolvency and the transaction operating injury to the creditors. This prohibition enforces the principle that the debtor's property, the common pledge of all the creditors, is not to be appropriated for the benefit of one of them. Civil Code, Arts. 1968, 1970, 1976, 1984 *et seq.*, 2655, 2658. But with other essentials to bring the transfer within the scope of the prohibition the law looks to the intent of the parties, and the important question whether there is any resulting injury to creditors. *Montilly vs. Creditors*, 18 La. 388. In this case the delivery embraced, as we read the record, the parts of an incomplete machine or portions of it, and appliances required for the machine, admitting of no other use. The defendant was the patentee. All the property delivered had been made for him. Our attention has been directed by plaintiff to the provision in the patent laws discharging from all liability for using or selling the patented machine, the purchaser from the patentee, or who constructs the machine before the patent issues, or one who makes such sales with the patentee's consent. Any privilege which it may be supposed was derived from this provision of the patent laws seems to us to be of small, if of any, importance to the commissioners of an insolvent firm whose property was sold or to be sold, and whose business was at an end. Practically, the patentee solely entitled to sell the machine was the only party to whom the incomplete parts of the machine was of the least use. To this effect is the testimony in the record which attributes to these castings or parts of the machines no value except to the patentee, save such value as is attached to old junk. The transfer, treating the defendant as a mere creditor, discharged over three thousand dollars of debt. The price was adjusted, we understand, at the factory rates, with the discount off allowed on large orders. With the light of this record, it seems to us this transaction utilizing metal in forms admitting of no use except to the patentee of the machine, and which could not be sold for any price equivalent to the indebtedness

the transfer settled, stands unaffected by the law, setting aside transfers by debtors, only when injurious to creditors. The interference of the law through the revocatory action with transfers by debtors to creditors, is not simply because of that relation. Cases are not infrequent where such transfers are beneficial to creditors, or, at least, work them no harm. Transactions between an insolvent debtor and his creditor, by which he gets property for his debt, are to be closely scrutinized, in view of the articles of the Code on that subject. We must, however, take the case as it is placed before us by the record. The testimony, in our appreciation, is that the property transferred was practically of no value, except to the patentee. Nor, from our examination of the record, is there any testimony to the contrary; that is, on this point of value. If we are correct in this appreciation of the testimony, we are called on to set aside a transfer operating no injury to creditors, but of benefit to them. Injury to creditors is an indispensable element of the revocatory action, and that basis, in our view, the record does not furnish. Of this opinion, too, was the lower court.

The plaintiff claims there was no delivery prior to the appointment of a liquidating commissioner. It is claimed by defendant that the property was set apart, put in a room and placed under the control of the defendant. The delivery before the appointment of the commissioners is contended for by defendant, and in argument for the plaintiff the actual delivery, it is insisted, was not till after the commissioners (the first that acted) were appointed. On this branch of the case, we think the tendency of our jurisprudence is to exclude the syndics or commissioners from objections of this character. The agreement in this case was made by the parties, it seems to us, in entire good faith and in the appreciation on both sides, that the defendant was entitled to the property, and that the transfer itself was the best for the interest of creditors and all concerned. When the present commissioners came into office, they found the defendant in possession under that agreement. Such an agreement, in our view, may well be deemed valid as against the syndic, or, at least, not to be assailed on the ground of non-delivery or delivery attempted, but not executed. The protection the law gives to *bona fide* contracts of the insolvent before the insolvency extends as well to defects or informalities in the giving in payment as to the sale itself. Civil Code, Arts. 2456 *et seq.*, 2655, 2658. Campbell vs.

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Siddell, 5 An. 274; Nicolopulo vs. Creditors, 37 An. 472; Partee vs. Corning, 9 An. 539. Irrespective, however, of this question of delivery we are dealing with a transaction which, if we correctly read the testimony, worked no prejudice to the creditors. In that view, the transaction is not open to attack.

Again Leeds & Co. not only manufactured the attachments sold by defendant himself, but when they sold sugar mills the opportunities often occurred of supplying also these attachments. When paid, they collected as part of the price, the royalties of defendant as patentee. These amounts, thus collected, remained in their hands. When they needed money the defendant would be called on for his notes which they would realize on discount. These pecuniary accommodations were due entirely to the relation they occupied of manufacturing for defendant his patented machines and manufacturies in advance to secure prompt execution of orders. The accommodations were, as it seems to us, on the basis of anticipated work to be done by the company and to be settled by the manufacture of the machine when the orders came either through defendant or from the planter ordering from the company. As the president of the company puts it in his testimony with reference to the defendant's notes, they were considered prepayment. In that view the defendant might well be deemed entitled to the machines or the incomplete machines—i. e., parts not put together on hand and delivered to him. Of course, the commissioners or syndics can not question the fulfilment of an obligation resting on the insolvent at or before the insolvency. Nor for the same principle can non-delivery urged by the commissioners avail them. Partee vs. Corning, 9 An. 539; Nicolopulo vs. Creditors, 37 An. 472. On this as on the other branch of the case we do not think the record affords any basis to disturb the judgment of the lower court.

It is therefore ordered that the judgment of the lower court be affirmed with costs.

No. 12,289.

STATE OF LOUISIANA VS. MICHEL SCOSSONI.

Substantially, the law of self defence, as given by the court in its general charge, covered the principle of law involved in the request made in behalf of the defendant for special instructions to the jury on the subject of self defence.

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It was therefore not error to decline to give the special instructions. Where there was no testimony to prove the character of the deceased, the court could not be required to instruct the jury as to weight to be given to character, as the instructions would have had no relevancy to the evidence in the case. The jury was properly instructed in so far as relates to a provocation by an antecedent wrong committed, which may have been felt by the accused. The omission in defining the crime charged, which the judge was not requested to supply, is not error. As relates to the character of the accused and the error urged to the charge in that particular, the following rule applies: Where there is no bill of exceptions or assignment of error the judgment will be affirmed.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Moise, J.

M. J. Cunningham, Attorney General; *R. H. Marr*, District Attorney, and *Jno. J. Finney*, Assistant District Attorney, for Plaintiff, Appellee.

Charles H. Luzenberg for Defendant, Appellant.

Argued and submitted November 21, 1896.
Opinion handed down November 30, 1896.

The opinion of the court was delivered by
BREAUX, J. The defendant, Michel Scossoni, was indicted by the grand jury for the parish of Orleans on the 7th day of April, 1896, for the murder of Frank D'Antonio, committed, it is charged, on the 18th day of February of that year. He was put on his trial on the 11th day of August, 1896, and was convicted of manslaughter, and his punishment fixed at ten years in the penitentiary. Several bills of exceptions were reserved during the trial to the rulings of the court. A motion for a new trial was filed; it was overruled and a bill reserved.

Perhaps the best method of getting at the questions involved in this case is to give a substantial statement of the facts.

The defendant Scossoni, while in his house, early in the evening, was murderously assaulted and shot by the deceased, who was his father-in-law. The deceased was arrested by some citizens and placed in charge of two police officers, who escorted him to the

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nearest patrol box with the intention of sending him to the police station. The wounded man, after his wound had been dressed at a neighboring drug store, was taken by citizens who had him in charge, to the same patrol box, with the view, from there, to send him to the Charity Hospital in an ambulance. Not less than fifteen minutes, and not more than thirty minutes, elapsed from the time of the shooting until the accused and the deceased were brought undesignedly face to face at the patrol box.

At the moment the deceased and the accused met at the patrol box, a policeman testified that he held D'Antonio, the deceased, by one arm, while the other policeman was inside the patrol box sending in the call for the wagon.

Immediately after the meeting, the deceased raised his arms and shook his clinched fist at the accused, at the same time said with an opprobrious oath: "You son —————, you are not dead yet."

The accused thereupon rushed toward D'Antonio and stabbed and slew him.

Upon this state of facts, the accused took bills of exceptions to the refusal of the judge to give special charges.

The court was requested in the first special charge to instruct the jury, viz.: "If they were satisfied from the evidence, that the deceased had attempted to assassinate the accused by secretly shooting him through a glass door, while the accused was peaceably and lawfully in his own house, and that shortly thereafter they had accidentally met, and from the motions and language of the deceased, the accused still bleeding and suffering from his wound, the accused believed and had reasonable ground to believe that the deceased intended again to attack him and take his life or do him great bodily harm, and that it was necessary to kill him in order to avoid the apprehended danger, the accused was justified in killing the deceased, although he was mistaken in the appearances, and although there was, in fact, no design on the part of the deceased to do him serious injury, nor any danger that it would be done."

The judge declined to give this charge for reasons stated on the bill. They are substantially that the law of self-defence, as given by the court in its general charge copied on the bill, covered the principle of law involved in the request.

Attention is called by the defendant to the portions of the general

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charge italicized as objectionable. This charge being lengthy we only copy the paragraphs and sentences in which are the words to which objection is urged:

"A man may repel force by force, even to the taking of human life against one or many who *manifestly* intend and endeavor by violence to commit a felony on his person."

"In a personal conflict it must appear *that the accused was assaulted and that this assault was of such a character that the accused had apparent reason to believe and did believe that his life was in danger or that he was in danger of suffering great bodily harm at the hands of his assailant.*

"The degree of force in defence of one's person must not exceed the bounds of prevention and defence. *This will depend upon the circumstances of the case, that is, the character of the assault, taking into consideration the relative situation and condition of the parties.* And in considering the danger to which one is subjected by an assault, *the law does not hold him to the same sound discretion and cool judgment that a juror is supposed to exercise in deliberating over the facts of the case. The jury should view the facts from the defendant's standpoint.*

* * * "If, under these circumstances, the assault was slight, or was not an assault, but merely insult and threats, by threats and angry motions not amounting to an assault, and the defendant's life was *not in real or apparent danger*, nor his person in *real or apparent danger of great bodily harm*, if he intentionally killed his assailant the crime would be murder. * * * If, however, his *life was apparently in danger*, although *not really in danger*, or his person *apparently in danger of great bodily harm* by the suddenness or violence of the assault, although *not really in danger*, and he *really and honestly believed* that his life was in danger, and he *had apparently reasonable grounds* for this belief, then if he slay his assailant it would be excusable homicide. The rule of law, briefly stated, is, the accused must have honestly believed in his danger at the time, and the evidence upon which he based that belief must have been reasonable and must have been such as would have induced such a belief in a reasonable person."

The italicized portions of the charge are at least softened, if not entirely explained and neutralized by the portions not here inserted. In our view that portion interpreted with the whole charge does not

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erroneously limit the right of self-defence. We understand the general rule of law on this point is: One must not exceed the limit of defence and prevention, and the evidence must be such that the jury can say that it had reasonable ground for the belief that the accused did not exceed these bounds.

There must have been an apparent necessity to ward off some unlawful and violent attack. The right of self-defence was not lessened by the whole instruction given. The learned counsel for the accused argues with force that the charge virtually decides that the fact of the accused being almost murdered by the deceased but a few minutes before the accidental meeting of the two men at the patrol box, and the further fact of the assault or attempted assault upon the accused by the deceased at the meeting, with the gestures and exclamations of the deceased, should not have alarmed the accused or caused him to apprehend any danger from the deceased.

We think it sufficient answer to say:

The defendant was allowed to prove the manner in which the deceased actually assaulted him at the time of the homicide.

This evidence was relevant and material.

Further, the assault must be one committed or threatened at the time of the homicide, or so immediately preceding as to justify the taking of life in self-defence, or to ward off imminent danger of bodily harm. The attempted assassination was not intimately connected with the assault. The deceased had been arrested and was in the hands of officers of the law, at least, fifteen minutes after the shooting.

On this point the jury was charged:

“While it is true the provocation must arise at the time of the commission of the offence and the passion must not be the result of a former provocation, yet in passing upon the sufficiency of a provocation and on the effect of the passion upon the mind of the defendant, the past conduct of the deceased toward the defendant, his threats, if any, and bearing—in fact, all the facts and circumstances of the case should be considered by the jury. An act standing alone may not be sufficient provocation, but may be ample when it is one of a series of similar acts.”

In considering the “facts and circumstances” of the case it included the admission of record, sustained by uncontradicted evi-

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dence that the deceased had shot the accused as before stated. It was necessary that at the moment there should have been some positive demonstration of the fell purpose; that the accused had reason to believe, or did believe that there was such a purpose to warrant the exercise of the extreme right of taking the life of a human being. A belief of danger, founded exclusively upon the attempted assassination, was not enough in this case to maintain the plea of self-defence.

The record does not disclose that at the time of the homicide the deceased was armed. Nor does it disclose that the deceased made any demonstration such as to place the accused in fear of death or of the infliction of great bodily harm.

In view of these facts the charge was not erroneous upon this branch of the case.

We pass to the question of the character of the deceased.

The court *a qua* certifies a fact sustained by the record that n^o attempt was made to prove the character of the deceased. The defendant urges that the real character as to bloodthirstiness of the deceased was illustrated to and well known by him from the fact of his having attempted to assassinate him. The intervening time between the attempting assassination, the arrest made and the disarming of the accused are reasons, we think, which sustain the ruling, which limited the instruction to the jury to the provocation which may have been felt without enlarging upon the subject and instructing them as in case the general character of a deceased person is assailed by proof.

It is also urged by the defendant that the charge is objectionable and misleading for the reason that the definition of murder is incorrect as it does not require the slayer to be of sound mind; that the definition of manslaughter is incorrect, as it requires the provocation to have arisen at the precise time that the blow was struck and confines the consideration of provocation to that precise period.

With reference to the definition of murder there was no bill of exception reserved to the whole charge or any special point made of the omission.

We think the following applies in this case: "Omissions which the judge was not requested to supply here have been deemed, therefore, not to be error." Bishop Cr. Pr., Vol. 1, Third Edition, paragraph 980, Sec. 2.

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With reference to manslaughter:

Evidence of the preceding act was not kept from the jury.

A portion of the charge sought to direct the jury's attention to the fatal encounter; another (copied, in our opinion) directs attention to the preceding act. Taken and interpreted together we do not think that there was error to the prejudice of the accused in thus charging.

Lastly, it is urged that the instructions as to the weight to be given to proof of good character of an accused is wrong.

We have searched in vain in the record for an assignment of error or bill of exception regarding character. "An alleged error discussed by appellant in his brief, but not otherwise appearing from the record, can not be considered on appeal." State vs. Romano, 87 An. 88.

This completes a review of the proceedings and we have found no grounds upon which the accused can be relieved.

Judgment affirmed.

No. 12,252.

THE STATE VS. LEON COMPAGNET.

Scruples of a Juror Against Capital Punishment.—The court may on the motion of the prosecution stand the juror aside when he has a fixed opinion against capital punishment. But the defendant can not challenge him upon that ground, particularly, if the juror himself does not ask to be excused from serving. The challenge was properly denied by the court.

Threats.—In order to be admissible as evidence a threat should indicate an intention to take the life of the one threatened.

Character of the Deceased.—The foundation was not laid to admit testimony to prove the character of the deceased by proving that an assault was about to be committed and that the assailed standing his ground, killed his assailant, although not in peril of life or exposed to suffer great bodily harm.

A PPEAL from the Twelfth Judicial District Court for the Parish of Calcasieu. Read, J.

M. J. Cunningham, Attorney General, A. R. Mitchell, District Attorney (D. B. Gorham and P. A. Simmons, Jr., of Counsel), for Plaintiff, Appellee.

Pujo & Moss and G. A. Fournet for Defendant, Appellant.

48 1470
104 1486
38 1470
113 802

State vs. Compagnet.

Argued and submitted November 7, 1896.

Opinion handed down November 30, 1896.

The opinion of the court was delivered by

BREAUX, J. The defendant, Leon Compagnet, was indicted by the grand jury of Calcasieu on the 9th day of September, 1896, for the alleged murder of Henry Cujcheney, in that parish, on the 28th day of May, 1896.

He was put on his trial on the 22d day of September, 1896.

On the 28th day of that month the jury having failed to agree on a verdict, it was discharged, and a mistrial entered.

The case was reassigned, and on the 1st day of October, 1896, he was put on his trial a second time, and was convicted of manslaughter, and his punishment was assessed by the trial judge at ten years in the penitentiary. He reserved a number of bills of exceptions; eight of these bills of exceptions present the same point, and are argued by the appellant as one bill of exception.

The first bill of exception was taken to the court's ruling in refusing to decide that a juror who had conscientious scruples against the infliction of the death penalty was an incompetent juror. The juror while being examined on his *voir dire* was asked by counsel for defendant whether he had conscientious scruples against the infliction of the death penalty. The prosecuting attorney did not challenge him, and the juror did not request to be excused. It therefore follows that the defendant had no legal cause to assign against this juror sitting in the cause. His rights were not prejudiced, and no error was committed of which he can complain. *State vs. Kennon*, 45 An. 1192; *State vs. Taylor*, 44 An. 783.

It is a sufficient ground of challenge by the prosecuting officer that a juror declares on oath, in answer to questions, that he has conscientious scruples on the subject of capital punishment.

It is also a sufficient ground to excuse a juror who on oath informs the court of his conscientious scruples. But the right ends here. The defendant has never been accorded this challenge for cause as a right under any of the decisions of this court. It has been decided by a court of another jurisdiction that the juror had no ground for excuse from serving as a juror; that it was a cause for challenge which the prosecuting officer might

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invoke, not the juror. Thompson and Merriam on Juries, par. 202.

The decisions of this court, however, to which our attention is directed, do not thus limit the right, for it is held that a juror may for that cause be excused on his own motion.

This court, however, has never decided (on the motion of the accused and at his instance alone) that it was a good cause of challenge.

The remaining grounds of objection are to the ruling of the trial judge sustaining objections to the admissibility of evidence of threats, communicated and uncommunicated, of character of the deceased for danger and desperation.

The evidence of the case to the stage of the trial, at which the offer to introduce testimony of threats and of the character of the deceased was made, was not reduced to writing. The court excluded evidence of threats and character of the deceased (offered on examination of the defendant's witnesses) on the ground that the proper basis had not been laid—in other words, that the alleged overt act had not been sufficiently shown.

Taking up for review the testimony on this point, made part of the bill of exception, we find that the first witness for the defendant (whose testimony is reduced to writing) testifies that the deceased, Guicheney, who appeared angry, passed him, walking rapidly in the direction of an alleyway. He motioned with his hand toward the accused, and the accused also made some motions of the hand. The accused stepped into his restaurant; the deceased stood at the entrance to the alleyway. He (deceased) jumped into the alleyway and immediately after the witness heard two shots. David Richmond, another witness, testifies that about ten minutes before the shooting he delivered a message from Guicheney to the accused.

This witness was sitting on the steps of the Royal Saloon, about two feet from the alley. The accused, he says, cursed the deceased, and said to him to come on. The former left the chair where he was sitting, and went into the restaurant. The accused came out of a side door of his restaurant into the alleyway, and stood about two feet from his door; about that time the deceased stepped into the alleyway. The accused asked him what message he had sent him by this witness (Richmond). To which the deceased answered that it was none of the business of the accused. The latter said something in French, which the witness did not understand; he (accused).

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pulled out his pistol; Guicheney (the deceased) was coming toward him; he (accused) motioned to him with his left hand, with his palm extended outward. Guicheney tried to catch the pistol; after seeing he could not catch it he turned sideways, and the accused shot him twice.

W. H. Smith, another witness, testifies that at the time of the shooting the defendant, Compagnet, was still in front of the side door of his restaurant; the deceased was approaching, and was at a distance of three or four feet. Immediately before shooting, the accused raised his left hand, and motioned toward the deceased, and said something that the witness did not understand. The deceased advanced with his left hand up, and his right hand by his side. He was dressed in undershirt, pants and apron. The defendant Compagnet, as a witness in his own behalf, testifies that the deceased cursed him, and said he would "break his mouth." To which he (defendant) answered "you can come." He left the front of his restaurant, stepped inside, armed himself with a pistol, and stepped out into the alley, at the entrance of which the deceased was standing with one hand on a post; he said to him: "What do you mean by sending me such a dirty message by the boy?" to which deceased replied: "The message does not concern you." The deceased then advanced somewhat rapidly, saying at the same time, "You son ——— I'll kill you, and I'll finish you to-day." "Guicheney (testified the witness) rushed at me and I shot him twice."

The theory on the part of the State and that on the part of the defence are at variance.

The theory of the defence is, that the deceased was a strong, muscular man; that he was quarrelsome, violent and dangerous; that instantly before the homicide he was advancing on the accused in a private alleyway, showing a determination to carry out his threat to kill the accused; that the latter motioned with his left hand toward the deceased not to advance.

The theory of the State, on the other hand is, that the accused invited the difficulty, and that he was advancing on the deceased at the time of the homicide, and that in consequence there was no evidence indicating an overt act, and no foundation was laid to admit the testimony offered.

Waiving the State's theory for the present, and giving consideration only to the theory of the defendant, we do not find that on the

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particular point of laying a foundation to admit the testimony offered, it is supported by sufficient testimony.

The testimony of the defendant annexed to the bill does not show that there was (as alleged by defendant) threat made to kill him about fifteen minutes before the conflict, as alleged.

The message, which the defendant says included a threat of intent to kill, was unquestionably provoking, insulting and obscene.

But it was not an expression of an intention to take life. Although very aggravating, it was not a menace (sent as it was by a mere boy), evincing a design to commit a possible act. Moreover, directly before the homicide, in answer to a question of the accused, deceased said that the message did not concern him. It was not relevant testimony, and as it was irrelevant, it was properly excluded.

With reference to the character of the deceased as a violent man and his strength, the testimony made part of the bill by the defendant, indicates that the quarrel was engaged in by both the deceased and the accused. *Secondly*: It does not reveal that the accused had retreated as far as he could with safety. *Thirdly*: Nor does it disclose that he was at the time in danger of being killed or of suffering great bodily harm. Without testimony of some weight denoting such an overt act, under our jurisprudence, in our opinion, a sufficient foundation is not laid to justify the admission of proof of character.

It has been decided that whether a proper foundation has been laid for such evidence as here offered, is for the trial court to decide, "whose rulings will not be reversed unless manifestly erroneous." State vs. Ford, 37 An. 443; State vs. Janvier, *Ib.* 614; State vs. Christian, 44 An. 950. Conceding, for the moment, that the position of the defendant is correct, and that the only testimony which should be considered is that of which we have before given a summary, it does not appear to us that the ruling of the trial judge, on the point here involved, was manifestly erroneous.

But reverting to the State's theory, "that the combat, or invitation to the combat, was mutual and the accused was advancing on the deceased," as stated by the trial judge after having heard all the evidence, under the circumstances of this case we do not think that we should entirely ignore the statement. It was the best evidence obtainable in view of the fact that all of the witnesses for the State had been examined when the motion was made. A motion timely

Fertilizing Co. vs. Assessors.

made, so as to enable the State to have the testimony of the overt act written, would present a different question. As it was, we have not found in this case that the Statute 113 of 1896 applies.

In considering either theory (the defendant's or the State) it does not appear to us that the ruling of the District Judge was error.

The judgment is affirmed.

No. 12,256.

48 1475
49 829

THE SOUTHERN CHEMICAL AND FERTILIZING CO. VS. THE BOARD
OF ASSESSORS ET ALS.

48 1475
51 581

The exemption from taxation of a class of manufacturing corporations is not affected by the fact that the corporation engages in a business distinct from manufacturing, the exemption being confined to the property employed in the manufacturing designated in the exemption provision in the Constitution. Constitution, Art. 207, Act No. 92 of 1886.

The processes applied by suitable machinery to animal matter and the offal of the city resulting in vaporizing the moisture, disposing of the gases, separating the grease or oils of such refuse and matter and the *residuum* converted into a fertilizer is the manufacture of such fertilizers within the scope of the provisions of the Constitution exempting from taxation property employed in manufactories. See the article and the act of 1886 above cited.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Rogers & Dodds and Farrar, Jonas & Kruttschnitt for Plaintiff,
Appellee.

*Samuel L. Gilmore, City Attorney, and W. B. Sommerville, Assistant
City Attorney, and Frank C. Zacharie* for Defendants, Appellants.

Argued and submitted November 20, 1896.

Opinion handed down November 30, 1896.

The opinion of the court was delivered by
MILLER, J. This appeal is by the defendant from a judgment reducing the assessments of plaintiff's property.

The plaintiff is a corporation organized to execute a contract with the city of New Orleans to remove and dispose of the garbage and

pillings of the city and to manufacture chemicals, oils, soaps, candles and other similar articles, and for these purposes to erect and maintain mills and the necessary plant. It is in proof that plaintiff has purchased property, erected buildings and provided the machinery for the manufacturing purposes stated in the charter. The claim of the company is that it is entitled to an exemption from taxation on such property under Art. 207 of the Constitution, as amended by the Act No. 92 of 1884, which, with other exemptions, declares that property, capital and machinery employed in the manufacture of fertilizers and chemicals, shall be exempt from taxation, provided that more than five hands shall be employed.

It seems that the plant of the company includes receiving vats, in which are placed dead animals, refuse from kitchens and other offal. By a heating process and the use of chemicals the moisture from this matter is vaporized, the gases disposed of, and grease or oil is extracted. The *residuum* in the vats, thus relieved of moisture and the grease or oil "cooked," as the witnesses express it, is adapted for fertilizing purposes and used as a fertilizer. This process of manufacture is detailed at length by the witnesses, and the results or products presented in the testimony are grease or oil extracted from the animal matter, and the *residuum* or tankage, rich, it is testified, in ammonia, is ground in the mill of the company, sacked and used as a fertilizer.

The defendant urges that the processes used by plaintiff are "reduction and conversion" of the garbage, and hence the plaintiff is not a manufacturer. But we must accept from the record, that the results produced by plaintiff are effected by the machinery, agencies and appliances of a manufacturing establishment, and the garbage that goes into the vats and extractors is changed into oil or grease and fertilizers, that is to say, garbage, in vats subjected to the action of heat, steam and naphtha, is changed into oils and fertilizers. It seems to us that whether "conversion or reduction," the processes and results are those incident to manufacturing, in the accustomed sense of the word in the contemplation it is to be supposed of the law-giver in granting the exemption from taxation of property employed in the manufacture of the various products specified, including chemicals and fertilizers. The defendant further contends, that the main business of plaintiff is to remove garbage from the city; that the use it makes of the garbage is the mere incident of that business,

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and hence the plaintiff is not a manufacturer. But the act of incorporation declares the objects of the company to be the execution of the contract with the city, for collecting and disposing of the city garbage, street pilings and refuse, and to manufacture chemicals, fertilizers, soaps, candles and similar articles, and for such purposes, to erect and maintain mills, plants and manufacturing establishments. The ordinance of the council, under which the contract was awarded to plaintiff, is to remove and dispose of the garbage. This function in aid of the cleanliness of the city is distinct from the manufacturing business announced in plaintiff's charter. That business, then, can not be deemed an incident to removing garbage, except in the sense that the garbage is used in plaintiff's manufactory, but obviously, as it seems to us, this police function of plaintiff, under its contract, can have no influence in determining whether besides, it is not a manufacturer in the sense of the exemption provision in the Constitution. The Ernst case cited in defendant's brief (*State ex rel. Ernst & Co. vs. Board of Assessors*, 36 An. 347) maintained that the rice miller was not a manufacturer of flour, because in cleaning the rice, dust was thrown off which was sold as rice flour. There is, in our view, no analogy between the decision and the point here, whether a manufacturer is stripped of that character because of his contract with the city to remove garbage. Again, it is claimed by the defendant that the making of oil or grease, is not a manufacture within the exemption claimed. Oil is not specified in the exemptions. Grease, in our opinion, however, produced, carries no exemption from taxation. We pass over the contention whether oil is within the meaning of chemicals as the term is usually employed. But under the evidence in this case, in producing the fertilizer, the manufacture of which is clearly within the exemption, the oil is extracted. It seems to us that the exemption is not lost, because in the manufacture of an article that does exempt from taxation, another product is also evolved.

We are asked, in any event, to exempt the property only to the extent it is used for the manufacture of exempted products, and to apply the rule of distribution in the Washburne case. (*Washburne vs. City of New Orleans et als.*, 43 An. 226.) There is no basis supplied by the record on which we could make this apportionment. It is in evidence that a portion of the property—*i. e.*, wagons, mules, the crematory to burn that part of the garbage not susceptible of use

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for manufacturing purposes and other appliances, are useful for the performance of the contract of the city, but are not part of or needed for the manufactory. The lower court, in its opinion, has maintained the assessment on all such property not connected with the manufactory. We think, under the testimony, this apportionment is the only rule we can apply.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

No. 12,273.

STATE OF LOUISIANA VS. MICHEL STELLY.

It is sufficient that an indictment framed under the provisions of a statute denouncing a statutory offence should charge a violation thereof in the identical language of the statute, or that of similar import.

An indictment charging in one count the malicious altering of the mark or brand of one hog, and in another count the larceny of one hog, is sufficient in law.

An indictment charging in one count the malicious altering of the mark or brand of a hog, the property of a certain person named, and in another count the larceny of a hog, the property of the same person named, does not necessarily denounce two contemporaneous acts forming parts of the same transaction, so as to render two distinct and separate sentences thereunder null and void. Being two distinct offences of the same generic characters same were pleadable in one and the same indictment in two separate counts.

A PPEAL from the Eleventh Judicial District Court for the Parish of St. Landry. *Dupré, J.*

M. J. Cunningham, Attorney General, and *R. Lee Garland*, District Attorney, for Plaintiff, Appellee.

Perrault & Bailey for Defendant, Appellant.

Submitted on briefs November 21, 1896.

Opinion handed down November 30, 1896.

The opinion of the court was delivered by

WATKINS, J. The defendant was indicted for the crime of having maliciously and feloniously altered the mark of a hog, the property

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of Isaac Rider, in one count, and also with the crime of larceny of one hog, the property of Isaac Rider, in another count.

On the trial there was a general verdict of "guilty in manner and form as charged in the bill of indictment, and thereupon the trial judge pronounced two judgments or sentences against the defendant. In the first he sentenced him to one year's imprisonment for the commission of the crime of having feloniously and maliciously altered the mark of a hog, and in the second he sentenced him to one year's imprisonment in the penitentiary for the larceny of a hog.

The defendant's counsel filed a motion to quash the indictment on the ground that in the first count it is not charged that the alleged alteration of the mark of the hog was made "with intent to steal," and that the second count does not describe the stolen property "by giving a description of the size, sex, color, age, etc., so as to support the plea of *autre fois acquit* or *autre fois convict* as required by the statutes," and that in consequence of said failure and omission the indictment is null and void.

This motion was submitted to and overruled by the court, but counsel retained no bill of exceptions to the ruling of the court, relying exclusively, upon an assignment of errors filed in this court.

I.

The first count of the indictment was framed under and in pursuance of the provisions of Section Three (3) of Act 8 of 1870, extra session, which declares that "whoever shall feloniously or maliciously mark or brand, or alter, or deface the mark or brand of any horse, mare, gelding, colt, ass, mule, neat cattle, hog, sheep or goat shall on conviction be imprisoned at hard labor or otherwise, etc." Treating this as a question of law apparent upon the face of the indictment, and a matter of substance which the defendant may assign in this court as error, we think it evident that counsel for the defendant is in error, as the charge of the first count is of the violation of a special statute, and consequently the crime denounced therein is a statutory offence, and may be charged in the indictment in the identical words of the statute or those of equivalent import. Knoblock's Criminal Digest, p. 233, and the authorities therein collated.

The words of the statute are feloniously and maliciously alter or deface the mark or brand of any one of the animals enumerated. It

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does not employ the phrase "with intent to steal," nor any other of similar import, and the indictment would, in our opinion, have been bad if same had been employed.

II.

It was unnecessary for the indictment to have mentioned the particular mark of the hog that is charged to have been altered, nor whose mark it was. The indictment does specify the name of the owner of the hog, the mark of which defendant altered, and presumably the hog bore his mark.

This description fulfils the requirement of the statute in every essential particular.

III.

The animal is described in each of the two counts of the indictment as one hog, the property of Isaac Rider, and in our opinion that was a sufficient description to satisfy the requirements of the law, and put the defendant upon his guard with reference to the commission of the particular crime he was called upon to answer for.

With regard to the want of proper description in the first count, we think it is disposed of by the discussion in the two preceding paragraphs; and with regard to that in the second, it is conformable to the rules of criminal proceedings often sanctioned by this court.

In any event the objection is one of a purely formal defect which is apparent on the face of the indictment, and can only be taken advantage of by demurrer or motion to quash before the jury is sworn; and same is amendable instantanly, and the trial proceeded with. Rev. Stats., Sec. 1064.

The defendant's counsel, should have reserved a bill of exceptions to the overruling of his motion to quash and pressed his objection here. But our predecessors held in *State vs. King*, 31 An. 179, that an indictment charging the defendant with stealing "one mule" was good and sufficient—citing *Gabriel vs. State*, 40 Ala. 357; *People vs. Littlefield*, 5 Cal. 355.

And in *State vs. Carter*, 33 An. 1214, it was held that the description of the thing stolen, in an information for larceny being "one hog, the property of A. B." is sufficient—citing *McBride vs. State*, 13 Bush. 337; *Taylor vs. State*, 44 Ga. 263; *Grant vs. State*, 2 Texas Ap. 163; *State vs. Mansfield*, 33 Texas Ap. 129; *Washington vs. State*, 58 Ala. 355; 2 Bishop Crim. Proc., Sec. 700.

This objection is not well grounded.

State vs. Bruno.

IV.

The objection that there is no name laid in either count of the indictment, by stating the place where the alleged crime was committed, is a mere formal defect—conceding that it be a defect, at all—and can not be taken advantage of by an assignment of error, especially in the absence of any averment to that effect in a motion to quash, and exception taken to an unfavorable ruling of the trial judge.

It is covered by the authorities cited in the preceding paragraph.

While it is true that the charge of one count in the indictment relates to the malicious and felonious altering of the mark of a hog, and that of the other count relates to the larceny of the same hog, it does not follow that these two felonious acts were necessarily contemporaneous and formed parts of the same identical transaction, so as to render two separate sentences thereunder null and void. There is nothing on the indictment to show that such was the case. It may well be that the proof at the trial showed that the altering of the mark of the hog was preparatory, to all appearances, to the contemplated subsequent larceny, and was expected by the accused to conceal the theft and prevent detection.

The two crimes charged are distinct one from the other and are denounced by two separate statutes, but of the same generic character.

We deem it a well recognized principle in our jurisprudence, as well as at common law, that such offences are pleadable in different counts of the same indictment. Knoblock's Crim. Dig., pp. 241 *et seq.*, and the authorities there cited.

Our examination and study of this case has led us to the conclusion that the trial judge has committed no error entitling the defendant to relief at our hands.

Judgment affirmed.

No. 12,276.

STATE OF LOUISIANA VS. JOHN BRUNO.

The appointment of a jury commission and the drawing of a jury by it under a law which has not been promulgated are illegal, null and void.

State vs. Bruno.

A PPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

M. J. Cunningham, Attorney General, and *L. T. Dulaney*, District Attorney *pro tempore*, for Plaintiff, Appellee.

A. & Chas. Fontelieu and *David Todd* for Defendant, Appellant.

Submitted on briefs November 21, 1896.

Opinion handed down November 30, 1896.

The opinion of the court was delivered by

MCENERY, J. The defendant was indicted for murder and found guilty without capital punishment, and sentenced to imprisonment for life. He prosecutes this appeal. He filed a motion to quash the *venire*, on the ground that the District Judge ordered the jury to be drawn in pursuance of Act 99 of 1896, and that at the time said order was given and the jury drawn, Act 99 of 1896 had not become a law in the parish of Iberia.

The judge appointed the jury commissioners by virtue of said act on 28th of July, 1896. The jury commission, on August 10, met and drew the jury. Act 99 of 1896 was promulgated at the capital of the State, in the official journal, on July 24, 1896. Art. 40 of the Constitution provides that "no law passed by the General Assembly, except the General Appropriation Act, or act appropriating money for the expenses of the General Assembly, shall take effect until promulgated. A law shall be considered promulgated at the place where the State journal is published the day after the promulgation of such law in the State journal, and in all other parts of the State twenty days after such promulgation." It is clear that the jury commission was appointed, and the jury drawn by said commission under a law that was not in existence at the time.

The motion to quash the *venire* should have prevailed. *State vs. Clark et als.*, 46 An. 1409.

The verdict and sentence are annulled and set aside, and it is now ordered that this case be remanded, to be proceeded with in due course of law.

State vs. Parry.

No. 12,289.

STATE OF LOUISIANA VS. D. W. PARRY.

While to sustain a conviction for larceny it should be proven that the goods and chattels alleged to have been stolen were feloniously stolen, taken and carried away, the indictment is not fatally defective if the word "away" is omitted and the meaning is supplied by other words.

The words "feloniously steal, take and carry," mean the felonious taking and carrying away the personal goods of another.

A PPEAL from the Ninth Judicial District Court for the Parish of De Soto. *Hall, J.*

M. J. Cunningham, Attorney General, and *J. B. Lee*, District Attorney, for Plaintiff, Appellee.

H. T. Liverman and *William Goss* for Defendant, Appellant.

Submitted on briefs November 21, 1896.

Opinion handed down November 30, 1896.

The opinion of the court was delivered by

BREAUX, J. The defendant was convicted and sentenced for stealing two heifers.

The indictment charged that he "did steal, take and carry two heifers," omitting, presumably by oversight, the word "away."

He moved in arrest of judgment on the ground that the indictment failed to charge an asportation of the property.

Without contradiction larceny is the felonious stealing, taking and carrying away personal property of another.

It none the less remains true that in an indictment an offence may be charged in words conveying the meaning of the statute.

The defendant is unquestionably charged with taking and carrying away feloniously the goods and chattels of another. The words as used charge an asportation of the property. Mr. Bishop in his work on Criminal Procedure, p. 698, 8d Ed., says:

"'Carry away,' 'lead away' or 'drive away,' are probably unnecessary where the word steal is employed, for it includes their meaning."

Succession of Stuart.

The point has not been decided heretofore by this court. We have sought support by reference to decisions of courts in other jurisdictions.

We find that in the *State vs. Chambers* (2 Green's Report, 308) the Supreme Court of Iowa held that the word "steal" means the felonious taking and carrying away of the goods of another. Again, in the *State vs. Mann*, 25 Ohio, 668, in an indictment for larceny of a sheep, it was charged that the defendant did feloniously steal, take and drive the sheep, without alleging that he drove or carried it "away;" it was held that the indictment sufficiently described the offence, for the reason that the word "steal" implied a carrying away. Lastly, in the *United States Digest*, New Series, Vol. VII, 1876, p. 516, No. 33, we find "The word steal in an indictment implies a carrying away."

Without expressing any opinion as to whether "steal" is as all-embracing in meaning as stated in the cited authorities, we think the indictable offence is clearly and specifically charged. The charge of "asportation" would not be more evident if the word "away" had been written in the indictment.

If one feloniously steals, takes and carries goods and chattels, there must be asportation. The character of the offence is set forth and the defendant could not be misled.

This being the case we can but regard the indictment as sufficient. Judgment affirmed.

No. 12,162.

SUCCESSION OF WILLIAM STUART.

ON MOTION TO DISMISS.

It is no cause for the dismissal of an appeal that a record has been omitted from the transcript which was not filed in evidence. It could form no part of the record, not having been filed.

ON THE MERITS.

The step daughter is not bound by the ties of consanguinity to render her step-father gratuitous services as a nurse and attendant during illness and decrepitude; but for such services she is entitled to compensation.

In case the evidence fairly supports the demand and no countervailing evidence was offered at the trial, this court will not reverse the finding of the district judge.

Succession of Stuart.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

W. S. Benedict for Miss Edward Anna O'Connor, Appellee.

Bernard Titcher for H. Abes, Opponent.

Rice & Montgomery for Mrs. Margaret Funnell, Opponent, Appellant.

MOTION TO DISMISS.

Submitted on briefs June 1, 1896.

Opinion handed down June 15, 1896.

ON MERITS.

Submitted on briefs November 2, 1896.

Opinion handed down November 16, 1896.

Rehearing refused December 14, 1896.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

McENERY, J. H. Abes and Mrs. Funnell filed oppositions to the account of the executor. They appealed from adverse judgments.

The motion to dismiss is on the ground that the transcript is incomplete and the fault is imputable to the appellants. There is an affidavit in the record made by counsel for Abes, that the documents not found in the transcript were never filed, and form no part of the record. One of the documents has reference, exclusively to the opposition of Abes. Without this document he can obtain no reversal of the judgment, if it would bring about such a result. He is in the record with only his opposition. But the record is complete, and the clerk's certificate sufficient.

The failure to file in evidence the judgment of Abes can not affect the appeal of Mrs. Funnell.

The motion to dismiss is denied.

 Succession of Stuart.

ON THE MERITS.

The opinion of the court was delivered by

WATKINS, J. The controversy raised in this case is with regard, principally to two items of the executor's provisional account of administration; one is that of \$1763.25 in favor of Miss Edward Anna O'Connor for services rendered in nursing and attendance on the deceased; and the other is a privilege claim in favor of Stuart and Adams for \$395.

Several of the recognized ordinary creditors filed oppositions to the homologation of the account in its entirety, questioning every item on the list of privileged debts; but on the trial either no proof was administered, or the oppositions were abandoned as to all, except to the two items above specified.

On the trial, the judge *a quo* heard the evidence, and, being satisfied of the correctness of the controverted items, rendered judgment approving the account in its entirety, and homologating same, and opponents have appealed.

The following is the exact copy of the account which Miss O'Connor rendered to the executors, viz.:

To services as nurse during last illness of deceased from June 20, 1891, to	
June 28, 1892, one year and eight days, at \$5 per day.....	\$1,965 00
Less credit.....	101 95
Balance due.....	\$1,763 25

It appears that William Stuart died on June 28, 1892, and that his will was thereafter probated and his executors qualified and began the administration of his estate.

This claim was presented to the executors, and the evidence shows that they acknowledged and approved it as a privileged indebtedness of the deceased, and subsequently entered same upon their provisional account.

As furnishing an accurate statement of the evidence appertaining to his claim we append, in its entirety, the reasons which JUDGE ELLIS assigned for his judgment, viz.:

"The account of W. W. Sutcliffe has been disposed of by agreement of the parties, and the claim of Miss O'Connor alone is to be decided. I have read the record, as I have heard it recorded.

"The step-daughter was the constant attendant of the deceased, ministered to his wants, and brightened his life from the moment that blindness fell upon him till the day of his death.

Succession of Stuart.

"I know of no rule to measure the value of the services of a faithful and dutiful daughter; but here a formal bill is presented for services as nurse, and I have to deal with the matter regardless of sentiment. The proof is that a capable nurse could not have been hired for less than is here charged. The deceased was helpless, and the claimant recognized in this account was his constant nurse and attendant. It is difficult for one who has not served to appreciate the confinement, the weariness and discomfort of attending such a patient night and day for so long a period as one year.

"In this case, similar services antedated the last year of the life of the deceased for several years, and the prior services more than compensate what that claimant received in the way of board, clothing, etc., from deceased. She was only the step-daughter—not an heir at law or by blood. All the heirs approved the claim as just, and were her claim rejected, the amount, after paying costs, that would go to the creditors would be small.

"She has been paid one hundred and one dollars and seventy-five cents, and I fix the balance due the claimant at fifteen hundred dollars, and as thus modified, the claim will stand in the account due her with privilege.

"This is for the last year, prescription having barred all claims for more than a year. This is less than five dollars a day, but on the whole case I think it is fair. Oppositions sustained to this extent only, as to said item, and otherwise overruled. As amended, account homologated and funds ordered distributed, succession to pay costs."

Opponents adduced no countervailing evidence. This is quite a peculiar case and singularly circumstanced. Miss O'Connor was only a step-daughter of the deceased, and was not bound by the ties of consanguinity to serve her step-father gratuitously. It is possibly true that she was indebted to him for clothing he furnished and also for board, but she had rendered services to deceased for some time previous to the commencement of the account in question, and these may be considered thereby compensated. This was the view the judge *quo* entertained.

We are not disposed to question the correctness of the opinion of our learned brother in this particular. But the evidence, in our judgment, does not support the claim of Stuart & Adams for three hundred and ninety-five dollars, and in this respect the decree

State vs. Wright.

should be amended. The approval of the executors suspended prescription.

It is ordered and decreed that the judgment appealed from be so amended as to reject and disallow the claim of Stuart & Adams for three hundred and ninety-five dollars, and that as thus amended, same be affirmed at the cost of the succession.

No. 12,294.

STATE OF LOUISIANA VS. GEORGE WRIGHT.

48 1488
50 1919

There is no occasion for the reduction of testimony to writing when the evidence against the accused has been rejected and disallowed as incompetent and inadmissible.

It is not the duty of the clerk of court to reduce to writing special charges which the counsel of defendant desires the trial judge to give to the jury, for the purpose of settling a difference between the judge and counsel as to what were the precise terms of the alleged special charge.

APPEAL from the Tenth Judicial District Court for the Parish of Avoyelles. *Cullom, Jr., J.*

M. J. Cunningham, Attorney General, *Phanor Breazeale*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

William R. Howard for Defendant, Appellant.

Submitted on briefs November 21, 1896.

Opinion handed down November 30, 1896.

The opinion of the court was delivered by

WATKINS, J. The defendant was indicted for the crime of burglary of a storehouse in the night-time, armed with a dangerous weapon, with intent to steal, and also with the crime of larceny of certain personal effects, property of the proprietor of the aforesaid storehouse, which he had burglariously entered—the indictment being in two counts.

On the trial there was a verdict of guilty and the court sentenced the defendant to three years' imprisonment in the penitentiary, and

State vs. Wright.

from the verdict and sentence he has appealed, relying upon four bills of exceptions and a motion for new trial.

I.

The *first* bill of exceptions relates to the refusal of the judge to allow the testimony to be reduced to writing in pursuance of the provisions of Act 113 of 1896. The judge assigns as his reason for this refusal that it was shown by the State's testimony that the confession "was made under circumstances of violence" and was not permitted to go to the jury as evidence, and that, consequently, it was unnecessary to delay the trial to have the testimony reduced to writing.

The confession having been superinduced by violence was clearly inadmissible and properly rejected; hence the accused was without interest to further prosecute the inquiry.

II.

The *second* bill relates to the refusal of the trial judge to cause the jury to retire and remain absent during the examination of the witnesses in relation to the defendant's alleged confession, on account of which declination defendant sustained injury entitling him to relief.

The judge's statement is that in the course of the examination of a witness for the State, he was asked whether or not the defendant had made a confession, to which question the witness responded "yes" before objection could be made by defendant's counsel; that thereupon the question was propounded as to what the confession was, when counsel for the defendant requested the court to examine the witnesses with a view to ascertain whether the confession was admissible, and to retire the jury during the progress of the examination; that although he did not direct the jury to retire as requested, the alleged confession was not allowed to go to the jury, and he "instructed the jury not to regard the answer of the witness that a confession had been made."

In view of the fact that the question was asked and immediately answered in the affirmative before an objection could be interposed, all that there remained to be done was what the judge did do—instruct the jury not to regard the statement of the witness. It was proper that the jury should have been directed to retire during the

State vs. Wright.

progress of this investigation, as it was a matter for the ear of the court alone; but in view of the result we can not perceive how any injury was done the defendant. There is in this no ground for a reversal of the verdict of the jury.

III.

The *third* bill relates to an alleged special charge of defendant's counsel which the trial judge declined to give; but between counsel and the judge there is a disagreement as to what was the special charge requested and refused.

The judge assigns, among other things, that the "court can not agree that such a charge as the (one recited) above was requested; had it been, in the terms set forth, the court would have recognized at once that the charge was copied directly from a text writer, and would have so charged the jury. Counsel for defendant did prefer a request in writing, but not in form or substance of the above. The paper was lost or mislaid; but the court is positive that no such charge was demanded."

Following precedents, we must accept the statement of the trial judge, and that is conclusive as to the correctness of his ruling.

IV.

The *fourth* bill relates to certain other requested special charges alleged to have been requested by defendant's counsel and refused by the court, but concerning the character and substance of which there was a difference between counsel for defendant and the court.

It appears at the time there was some discussion on the question, and counsel, excepting to the action and decision of the judge, proposed to have "the clerk (of court) reduce to writing the special charges and the subject matter of the bill of exceptions."

But the judge refused to have this done, on the ground that such was not the duty of the clerk, but that of the counsel desiring special charges given by the court.

The trial judge was entirely correct, It was not the duty of the clerk to prepare such special charges for counsel, especially when confronted with the fact that there was a question between the judge and counsel as to the particular terms of the charges that had been previously requested.

There is no objection—indeed it is the rule—that the clerk should

State vs. Laborde.

make a note of objections that are taken during the progress of the trial, in case there be no objection or contest about it; but the correct practice and safer rule in making any reservation is for counsel to formulate his objection in writing, and furnish a copy thereof to the judge and one to the opposing counsel. In the event of an adverse ruling by the judge counsel should prepare a bill of exceptions and incorporate his objection therein, reserving his copy of his reservation for identification therewith.

V.

There is no issue raised in the motion for a new trial save that the verdict of the jury was contrary to the law and evidence; and, following precedents, we must decline to consider it, as it involves only a question of fact.

Judgment affirmed.

No. 12,250.

STATE OF LOUISIANA VS. CLEOPHAS LABORDE.

The Act No. 113 of 1896 which provides "for the manner in which bills of exception shall be taken in the trial of criminal cases" requires that the "statement of facts" which in case of appeal is to be attached to the "bill of exception" is to be made under orders of court and is not to be made out by the clerk of his own motion or simply at the instance of counsel.

A bill of exception taken by a defendant to the ruling of the judge should be written up and submitted to the District Attorney and to the judge for examination and signature, the opportunity should be afforded the court of ascertaining whether the statements of the bill presented for signature are correct and for such statement and explanation by the court as to it may seem necessary.

It is the duty of the court to give its charge in writing, if requested. It would be a practice not to be tolerated, that counsel failing to make such request should be permitted to make through the clerk an *ex parte* statement as to what the judge charged and as to what objection he urged to the same as it was so declared to have been given.

A PPEAL from the Seventeenth Judicial District Court for the Parish of Orleans. *Debaillon, J.*

M. J. Cunningham, Attorney General, and *M. T. Gordy, Jr.*, District Attorney, for Plaintiff, Appellee.

A. & Chas. Fontelieu for Defendant, Appellant.

48	1491
107	547
48	1491
e115	744
48	1491
f118	658
f119	131
48	1491
f118	658
f119	131

State vs. Laborde.

Submitted on briefs November 21, 1896.

Opinion handed down November 30, 1896.

The opinion of the court was delivered by

NICHOLLS, C. J. Defendant was indicted for murder. He has appealed from a verdict convicting him of manslaughter and from a sentence based thereon to imprisonment for ten years in the penitentiary.

In the brief filed in this court on behalf of the appellant it is said: "He relies for a reversal on the verdict and sentence of the court upon a bill of exceptions reserved to the following part of the judge's charge:

"As to the tender appeal made on behalf of the little children, you must give him a deaf ear. You will now take the case, forgetting everything but the law, the evidence and your oaths, will pass an honest and deliberate verdict between the State and the prisoner."

The only evidence before us touching the matter complained of, is found in the transcript, in the following copy of a certificate of the District Clerk, under date of the 25th of September, 1896, the date of the trial:

"STATE OF LOUISIANA }
VS. }
"OLEOPHAS LABORDE. }

"Counsel for defendant objects to that portion of the charge of the court: 'The tender appeal made by the presence of the children you must turn a deaf ear,' to which the counsel reserved a bill of exceptions, and tenders this in lieu of a bill.

"I hereby certify the above and foregoing to be a true transcript of the proceedings had in the above bill of exceptions.

"Witness my hand officially this 25th day of September, 1896.

(Signed)

"JAMES G. DEBLANC,

"Dy. Clerk of Court."

Defendant bases his claim that the above certificate brings properly to our consideration for review the charge of the judge upon Act No. 113 of 1896. That statute declares that "on the trial of all criminal cases in this State, when an objection shall be made and a bill of exception reserved, the court shall, at the time and without

delay, order the clerk to take down the facts upon which the bill has been retained, which statement of facts shall be preserved among the records of the trial; and if the case be appealed the clerk shall attach to the bill a certified copy thereof, which shall be taken by the appellate court as a correct statement upon which the exception is based."

The provisions of this statute have no application to the certificate in the transcript, as a bare inspection will show. The "statement of facts" which the act of 1896 directs to be attached to "bills of exception" are to be made under orders of court (which would be granted as of course) and are not to be made out by the clerk of his own motion, or simply at the instance of counsel for defendant.

There was no bill of exceptions taken in this case to which it was attached, and it would be (even if otherwise strictly correct) absolutely without effect, independently of a bill. There is nothing to show that it ever came to the knowledge of, or under the eye of either the judge whose charge is referred to, or the District Attorney.

An objection to the charge of the judge should be made to the court. There could be no objection that the specific objection made by an accused should be stated by him and noted by the clerk, but if overruled, a bill of exceptions should be reserved, which being written up, should be submitted to the District Attorney and the judge for examination and for signature. The Attorney General very correctly states that the judge should have an opportunity of ascertaining whether a statement made as to what his charge was is a correct statement, and that he should have an opportunity to correct and explain the same, and the circumstances under which it was given. There is no excuse for any difference between counsel and the court as to the charge of the court in any particular case.

It is the duty of the court to give its charge in writing, if requested, and it would be a practice not to be tolerated that counsel failing to make such request, should be permitted to make, through the clerk, an *ex parte* statement as to what the charge was, and as to what objection he urged to the same as it was so declared to have been given. This very case shows what would be the result of such a course. The charge of the court is not in the record. The certificate declares that "counsel for the defendant objects to that portion of the charge: 'The tender appeal made by the presence of the children you must turn a deaf ear.'"

State vs. Laborde.

Submitted on briefs November 21, 1896.

Opinion handed down November 30, 1896.

The opinion of the court was delivered by

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"STATE OF LOUISIANA }
 VS. }
"CLEOPHAS LABORDE. }

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"I hereby certify the above and foregoing to be a true transcript of the proceedings had in the above bill of exceptions.

"Witness my hand officially this 25th day of September, 1896.

(Signed)

"JAMES G. DEBLANC,

"Dy. Clerk of Court."

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delay, order the clerk to take down the facts upon which the bill has been retained, which statement of facts shall be preserved among the records of the trial; and if the case be appealed the clerk shall attach to the bill a certified copy thereof, which shall be taken by the appellate court as a correct statement upon which the exception is based."

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There was no bill of exceptions taken in this case to which it was attached, and it would be (even if otherwise strictly correct) absolutely without effect, independently of a bill. There is nothing to show that it ever came to the knowledge of, or under the eye of either the judge whose charge is referred to, or the District Attorney.

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It is the duty of the court to give its charge in writing, if requested, and it would be a practice not to be tolerated that counsel failing to make such request, should be permitted to make, through the clerk, an *ex parte* statement as to what the charge was, and as to what objection he urged to the same as it was so declared to have been given. This very case shows what would be the result of such a course. The charge of the court is not in the record. The certificate declares that "counsel for the defendant objects to that portion of the charge: 'The tender appeal made by the presence of the children you must turn a deaf ear.'"

Seelig vs. Dumas.

Defendant's version of it is given in the extract from his brief, which we have quoted. The District Attorney and Attorney General inform us that the charge read as follows: "You will therefore give to the facts not only their most reasonable construction, but also their most charitable construction, and if when thus considered, they fail to satisfy you of his guilt, you will acquit him regardless of consequences. To the tender appeal made on behalf of the little children you must turn a deaf ear. You will now take the case forgetting everything but the law, the evidence and your oaths, you will pass an honest and deliberate verdict between the State and the prisoner," and that "the burden of the argument on behalf of the defendant was a strong and pathetic appeal for himself and children."

The judge himself who gave the charge has made no statement on the subject at all. He was not called upon or placed in position to do so. Matters are not before us in such a form as to enable us to review the judge's charge.

The judgment appealed from is therefore affirmed.

No. 12,291.

STATE OF LOUISIANA VS. JIM WILLIS.

A PPEAL from the Ninth Judicial District Court for the Parish of De Soto. *Hall, J.*

Submitted on briefs November 21, 1896.

Opinion handed down November 30, 1896.

NICHOLLS, O. J. The accused was prosecuted for murder, found guilty, and sentenced to death. From that sentence he has appealed. The judgment is affirmed.

No. 12,164.

PHILIP W. SEELIG VS. THEODORE DUMAS.

Where a lessor claims a specific amount in damages by reason of his property having been fraudulently sold by his lessee to a fraudulent purchaser, the action is one *ex delicto*. C. C. 2824.

Seelig vs. Dumas.

Whether possession of the property be still with the defendant fraudulent purchaser or not, such purchaser having frustrated plaintiff in the legal exercise of his rights, will not be permitted to turn the plaintiff round to a tedious and possibly fruitless pursuit and search for the property, and to litigation with persons who may have acquired it from the defendant (*Thornton vs. Mansker*, 10 La. 127).

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

A. D. Henriques, A. Brieugne and Branch K. Miller for Plaintiff,
Appellant.

P. L. Fourchy for Defendant, Appellee.

On first hearing the judgment of the District Court, which was in favor of the defendant, was affirmed.

On June 30, 1896, a rehearing was granted.

Case submitted on rehearing November 2, 1896.

Opinion handed down November 30, 1896.

The opinion of the court was delivered by

NICHOLLS, C. J. The parties have, on the rehearing, submitted this cause on brief; plaintiff's counsel calling our attention specially to the cases of *Stevens vs. Older and Ohandler*, 26 An. 634, and *Baldwin vs. Young*, 47 An. 1467.

In plaintiff's original petition he alleges that defendant was indebted to him in the sum of five thousand dollars, for this: That on the 28th of November, 1891, he leased to Theresa Hamilton the lot of furniture referred to which was used by her at No. 139 Custom-house street, under the obligation not to remove the same from said premises; that on Sunday, the 2d of October, 1892, defendant went to said premises and colluding with Theresa Hamilton to defraud and deprive petitioner of his property he surreptitiously removed the same to his store, where he disposed of and appropriated the same to his own use and benefit; that defendant was well aware of the fact that the furniture did not belong to Theresa Hamilton, but did

Seelig vs. Dumas.

belong to petitioner, and that, in any event, they were plaintiff's property, and if, as claimed by defendant, they were purchased by him from Theresa Hamilton, they were so purchased for insufficient consideration, in bad faith, with notice that she had no title, and not in open market in the usual course of business. On these allegations he prayed for judgment against defendant for five thousand dollars.

An exception to plaintiff's petition, on the ground of vagueness having been sustained, plaintiff amended his petition, in which he reiterated all the allegations of his original petition. He then alleged that he had made with Theresa Hamilton a contract for the lease of certain furniture described; that under the terms of said contract, she, on the conditions mentioned therein, was to have the right to purchase said furniture; that on the date mentioned in the original petition defendant unlawfully, fraudulently and tortiously obtained possession of said furniture under the cover of a pretended contract with Theresa Hamilton, purporting to be a sale of said property to him; that he then and there well knew that she was not the owner of, and had no right to sell the same, and also knew that petitioner had rights of which said pretended contract was designed by defendant to fraudulently deprive him, and to these ends he colluded and conspired with Theresa Hamilton; that by reason of said acts and contract of defendant he had obtained possession of said furniture and refuses to restore the same to petitioner or to recognize any right to the same petitioner might have in the premises; that Hamilton to the knowledge of defendant had paid to petitioner no sum whatever upon account of said contract between herself and plaintiff; that the furniture belonged to petitioner, and defendant fraudulently obtained the same from Hamilton well knowing that Hamilton was not, and he, petitioner, was the owner of the same. Plaintiff reiterated his prayer for judgment for five thousand dollars. Defendant pleaded a general denial.

The court rendered judgment in favor of the defendant and against the plaintiff, and he appealed.

In the brief filed on behalf of the plaintiff the action is claimed as being one for "damages" against defendant for "having maliciously incited and encouraged Theresa Hamilton to violate her agreement, which was obviously to the prejudice of plaintiff." He cites *Angle vs. Chicago, St Paul, etc., Railroad Company*, 151 U. S., p. 2; *Walker vs. Cronin*, 107 Mass. 555. Bishop on Contract Law, Sec.

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498; Green vs. Button, 2 Cr. Mees & R. 707; Lumley vs. Gye, 2 Bl. & Bl. 216; Bowen vs. Hall, 62 B. D. 333, 337; Rice vs. Manley, 66 N. Y. 82; Jones vs. Stanley, 76 N. C. 355, 366; Haskins vs. Royster, 70 N. C. 601; N. Y. Land and Improvement Company vs. Chapman, 118 N. Y. 288, and several English decisions to the effect that if one maliciously interferes in a contract to the injury of the other, the party injured can maintain an action against the wrongdoer.

Plaintiff, in the agreements which he made with Theresa Hamilton, in the pleadings he has filed and the argument which he has presented has made it difficult for us to ascertain with certainty the precise character of the claims which he advances or of the injury he asserts. The allegation in his petition that the original contract between himself and Theresa Hamilton was one of lease; the averment that he was still the owner of the furniture at the time when defendant claims to have purchased it from the latter for five thousand dollars, the full amount fixed as between himself and Hamilton as the value of the property without making any deduction for the sum of twenty-five hundred dollars received by him from her prior to having disposed of the property, place him, before us, in our opinion as claiming to be a lessor who had been injured or damaged to the extent of five thousand dollars by reason of his property having been fraudulently sold by his lessee to a fraudulent purchaser, who not only was fully advised at the time of his purchase that his vendor had no title, but was additionally fully advised of plaintiff's ownership. There is no demand in the suit for a return of the property to the plaintiff coupled with an alternative prayer for a money judgment, but a prayer for an immediate judgment against defendant for five thousand dollars as damages. The action is really one *ex delicto* under Art. 2824, C. C.

The defendant under the general issue was permitted to show that he had purchased the furniture from Theresa Hamilton for the sum of one thousand one hundred and eight dollars, of which three hundred and fifty-eight dollars were paid by crediting to that amount an account which he held against her, and seven hundred and fifty dollars through a check given to her. Defendant claims that the contract between plaintiff and Theresa Hamilton was not a lease, but an absolute sale of the furniture; that, therefore, she could legally sell and he could legally buy the same. The evidence establishes beyond question that defendant was fully informed of the contracts between

Seelig vs. Dumas.

plaintiff and Theresa Hamilton, and of the exact situation between those parties when he undertook to buy the furniture from her.

Granting that they evidenced an absolute sale as he declared them to have been, he knew (upon that hypothesis) that a large portion of the price which had been fixed between Theresa Hamilton and the plaintiff was still unpaid and stood secured as to payment by vendor's privilege, and he deliberately and intentionally, with a view of benefiting himself and cutting off plaintiff's privilege, purchased the furniture, and withdrew it from plaintiff's pursuit. The evidence does not show that defendant has disposed of the property, but its whereabouts is uncertain. We are inclined to think he still has it in his possession, or under his control. (C. C. 2312).

Be that as it may, having frustrated the plaintiff in the legal exercise of his rights, we do not think defendant can be permitted to turn him round to a tedious and possibly fruitless pursuit and search for the property, and to litigation with persons who may have acquired it from the defendant (Thornton vs. Mansker, 10 La. 127). It was never worth five thousand dollars.

In the contract between plaintiff and Theresa Hamilton the risk of non-payment of the price by her entered as largely into the estimated value placed upon it as did its real worth. We do not think it was originally worth more than twenty-five hundred dollars. Whatever opinion we may have as to the exorbitancy of the price fixed we are not in a position to say as between the parties to this suit, and as matters have shaped themselves before us, that twenty-five hundred dollars was not still due by Theresa Hamilton (if the act was one of sale) to the plaintiff at the time of defendant's purchase and stood secured by vendor's privilege upon the property, Theresa Hamilton is not a party to this suit, she has raised no objection to the contract, or sought its rescission, but she has, on the contrary, affirmed its binding force by disposing of the property (of which she held the title, if at all, only by force of the contract) to defendant. Defendant having purchased from her under that title is in no position to question the contract made between her and her vendor, whether it was wise or unwise, judicious or injudicious. Assuming matters to have been such as he claims it to have been, he purchased for eleven hundred and eight dollars, and took possession of furniture on which there existed to his knowledge, at the time of his purchase, a vendor's privilege in favor of the plaintiff. We find no

Seelig vs. Dumas.

evidence going to show or fix the value of the property at the time of this purchase other than the price of one thousand one hundred and eight dollars, which was that fixed between defendant and Theresa Hamilton. If the property had been at that time in the ownership and possession of the latter and had been sought to be made responsive to the claim of plaintiff for the unpaid purchase price, it is uncertain whether it could or would have sold for even that amount.

Assuming the contract between plaintiff and Theresa Hamilton to have been one of lease, the effect of defendant's purchase would, at worst, have deprived plaintiff of property not exceeding in value the sum of one thousand one hundred and eight dollars. The claim of five thousand dollars damages set up by him could under no view of this case we might adopt be sustained.

In the opinion heretofore rendered by us we adopted defendant's construction of the contract between plaintiff and Theresa Hamilton that it was one of sale. We reached that conclusion from the fact that possession had been given to Theresa Hamilton, from the large amount payable weekly, which viewed from the standpoint of the contract being a lease would be out of proportion to the value of its use, and from the clause in the act by which, on default of any payment as agreed, the whole value of the furniture as mentioned in the annexed promise of sale (\$5000) would be considered due.

There is no doubt that as between Seelig and Theresa Hamilton it was understood that the title should not pass until Seelig should have received from the latter five thousand dollars, for as between them there was declared to be only a "promise of sale" when plaintiff should have received five thousand dollars under the lease. The "promise of sale" was declared to be without prejudice to the contract of lease, and "in case of failure to pay as agreed it was to become null and void," a clause which, if given effect to, would leave the contract of lease absolute and untrammelled and a clause inconsistent with the clause in the first agreement, that in case of default of payment the plaintiff would be entitled to sue for the whole value of the furniture (as fixed in the promise of sale) as an amount considered due.

Theresa Hamilton signed the agreement of lease which fixed no absolute time of duration, but did not sign that evidencing a promise of sale, and she nowhere directly bound herself to purchase the furniture.

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The only parties to this litigation are Seelig, the owner of the furniture, and Dumas, who acquired and took possession of it under the circumstances stated. There are no creditors of either Seelig, Hamilton or Dumas involved, and no rights of third persons to be affected.

We need not discuss what construction we might be justified in placing on the agreements between plaintiff and Theresa Hamilton were this case before us under different conditions and different parties. We think the situation was such as to have required of defendant in the exercise of good faith that he should have respected the obvious agreement between plaintiff and Theresa Hamilton that the furniture should be held to remain under lease, and the title to continue in Seelig until he should have been paid five thousand dollars. We are not disposed for the benefit of the defendant to nicely scrutinize and construe the terms of the agreement between plaintiff and Theresa Hamilton. They are certainly open to discussion, and we think that justice and right require at our hands that we give plaintiff the benefit of any and all doubts as respects them. Not to do so would be to enable defendant to take advantage of a wrong, and to perpetrate a fraud. We say this upon the hypothesis that defendant would have occupied a different and a better position as a party buying from the vendee of movables (when there remained to his knowledge a portion of the price unpaid) with the fraudulent intent of cutting off from the vendor the benefit of his privilege upon the property sold, and with the intent of benefiting himself, than he would as buying from a person without title. We think this case is fairly brought under the operation of the provisions of Art. 2324 of the Civil Code, and the decisions of this court in the cases of *Irish vs. Wright* and others, 8 Rob. 428; *Smith vs. Berwick*, 12 Rob. 20, and *Thornton vs. Mansker*, 10 La. 127.

We think the price agreed upon between defendant and Theresa Hamilton at the time of the sale of the furniture a fair criterion for the purposes of this suit as the value of the property, and that plaintiff is entitled to a judgment for that amount with legal interest (as for the use of the property) from judicial demand. If the amount fixed upon as the value of the property be deemed by the defendant to be too large, he will be enabled to escape from any injury which he might suffer from that estimate by taking advantage of the privilege which we will grant him in the judgment of satisfying the judgment

State ex rel. Saizan et als. vs. Judge.

for so much of the principal sum as shall be equaled by the value of the furniture taken, which defendant may return to the plaintiff within ten days after this judgment shall have been returned to the District Court, the said value to be determined by the District Court. (C. C. 2812).

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the judgment rendered herein by this court be and the same is hereby set aside, and it is now ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed.

It is further ordered, adjudged and decreed that the plaintiff, Philip W. Seelig, do have judgment against and recover from the defendant, Theodore Dumas, the sum of eleven hundred and eight dollars, with legal interest thereon from judicial demand until paid.

It is further ordered, adjudged and decreed that defendant have the privilege of satisfying this judgment for so much of the principal sum as shall be equaled by the value of the furniture taken, which defendant may return to the plaintiff within ten days after this judgment shall be returned to the District Court; the value of the same to be determined by the District Court, and this cause is remanded to the District Court to take action thereon should defendant avail himself of the privilege within ten days.

No. 12,219.

STATE EX REL. DR. JAMES P. SAIZAN ET ALS. VS. THE JUDGE OF THE ELEVENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. LANDRY.

The District Court issued a final injunction restraining and prohibiting before they had qualified appointees of the Governor from exercising the duties of the offices to which they had been appointed. The parties enjoined applied to and obtained from the Supreme Court writs of prohibition and *certiorari* prohibiting the District Judge from further action in the premises.

Held: It was the duty of the judge to obey. If the effect of the writs issued by the Supreme Court was to maintain the *status in quo* as fixed by the issuance of the writ of injunction by the District Court—any violation of the writ which either the District Judge or the District Attorney might deem a contempt should be called to the attention of the Supreme Court; if under the circumstances any contempt had been committed, it was of the authority of the Supreme Court, not the District Court. So, where the District Judge, under such conditions, punishes parties as for a contempt of his authority by disobeying the writ of injunction, the judge will be held to have been guilty of a contempt of the authority of the Supreme Court.

48 1501
49 701

48 1501
52 1222

48 1501
d119 883
e120 634
e120 640

48 1501
f125 777

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The object of the writ of prohibition is to prevent further action in a case where jurisdictional power and authority to act are denied; the function of the writ of *certiorari* is to undo matters which had taken such shape as not to be remedied by the writ of prohibition; the writ of *certiorari* is a substantive and far-reaching corrective writ, concurrent with and frequently taking the place of the writ of prohibition.

In the exercise of its supervisory jurisdiction the Supreme Court is not rigidly tied down to form; when the facts of a given case, being recited, present a case for relief under its supervisory jurisdiction and the prayer is for such orders and decrees as those facts will justify and for general relief, the Supreme Court will not remit the relator to new, expensive, unnecessary and sometimes fruitless remedies, simply by reason of a mistake in the writ asked for.

When the question at issue is the power of the judiciary to summarily and positively check by final injunction the exercise of the powers of the executive department in the appointment of an officer the "matter in dispute" is not measured by the amount which is declared to be the value of the office.

The value of the particular office in question which furnished the occasion from which arises a contest as to the powers of two departments of government, will not in such a controversy, determine the jurisdiction of the Supreme Court. It is the bounden duty of the judiciary to give some *prima facie* force and effect to the acts of the executive; his acts are not to be presumed illegal and utterly wrong.

The court affirms expressly *State ex rel. Kuhlman vs. Judge*, 47 An. 53, and *State ex rel. Keller vs. Judge*, *Id.* 61.

ON APPLICATION for Writs of *Certiorari* and Prohibition and Rules for Contempt.

Thomas H. Lewis and E. B. Dubuissou for Relators.

Albert Voorhies, *amicus curiæ*, Kenneth Baillio, E. D. Estillette and Clegg & Quintero for Respondents.

Submitted on briefs November 2, 1896.

Opinion handed down November 30, 1896.

STATEMENT OF CASE.

On the 6th of July, 1896, relators J. P. Saizan, Robert Lafleur, Olibe Manuel and E. H. McGee filed in the Supreme Court a petition alleging that on the 30th of June, 1896, they had been appointed and commissioned by the Governor of the State, with the advice and consent of the Senate, under the provisions of

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Act No. 94 of 1884, respectively police jurors for the first, fifth and eighth wards of the parish of St. Landry. That said appointments were made by the Governor on the representation and showing that said wards were accorded such a population by the census of the United States for the year 1890 as entitled each of them to one more police juror than they had heretofore had or claimed, fortified by a written opinion of the Attorney General to that effect, and that the appointments ought to be made by the Governor; that a vacancy existed in said wards under said act and said census which it was the duty as well as the right of the Governor to fill on the fact being called to his attention; that notwithstanding the fact that relators were appointed and commissioned as police jurors without solicitation on their part, they were enjoined by the District Judge for the parish of St. Landry from in any manner acting or assuming to act as police jurors, and the relator McGee, president of the police jury, was enjoined from recognizing them as such until their right to such offices should have been judicially determined. They averred that said injunction was granted on the petition of the District Attorney for the parish of St. Landry on the simple allegation that the appointments of relators as police jurors by the Governor was illegal and wrongful; that the District Court was utterly without jurisdiction, power or authority to issue the writ of injunction on the showing made. That the petition neither by the allegations nor by the facts set up any right or authority or warrant of law in the District Attorney to intervene in the matter on behalf of the State because it is not charged that relators had usurped or intruded into, or attempted to usurp, intrude into or unlawfully hold, or exercise any public office, and because when there is no contest for the office, as in this case, the right of the District Attorney to proceed of his own motion under Sec. 2593 of the Revised Statutes of 1870 is against "parties offending" is by a direct action setting up all the facts constituting the offence and meeting the issue of the right to the office, and not by a simple injunction, which if maintained would make the party claiming the office the plaintiff in a suit to have the right to the office judicially determined. That it was not the intention of the Legislature to confer upon District Attorneys the power to question the rightful exercise by the Governor of the functions of his office as had been attempted in this case. They alleged that they had pointed out to the District Judge his want of jurisdiction and power to issue

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the restraining order herein granted and requested him to vacate it and set it aside, but he refused to do so and persisted in his illegal assumption of authority and jurisdiction in the premises. In view of the premises relator prayed that writs of prohibition and *certiorari* issue directed to the District Judge and District Attorney forbidding the former to take cognizance of the case and the latter to prosecute it further until after due hearing.

Upon this application ASSOCIATE JOSEPH A. BREAU of the Supreme Court issued the following order: "It is ordered that the judge of the District Court and the District Attorney made respondents show cause on the first day of the next regular term of this court why the writs applied for in the foregoing petition should not be made absolute and perpetual and that respondents proceed no further in the matter of the injunction, and that they give no recognition to allegations made for an injunction until all parties concerned will have been heard and trial had before this court at said time and the issues between the parties in the premises finally determined after an opportunity is offered for a full and deliberate investigation. That the writ of *certiorari* issue and needful copies be furnished."

On the first day of the present term the District Judge and District Attorney filed in court a certified copy of the documents filed and proceedings had in the District Court for the parish of St. Landry in the matter referred to in relator's petition, and submitted the issues involved, upon relator's application, upon the papers and documents filed, accompanied by a brief in support of the correctness and legality of the action taken in the District Court.

From the record it appears that the injunction which issued in the premises from the District Court was based upon the following petition presented by the District Attorney for the Eleventh Judicial District:

"The petition of the State of Louisiana on relation of R. Lee Garland, District Attorney of the Eleventh Judicial District of Louisiana, with respect represents: That at the general election recently held throughout the State of Louisiana there were elected, in due accordance with the requirements of law, the following named police jurors in and for the several police jury wards of the parish of St. Landry, to-wit:

"For the First Police Jury Ward of said parish—Daniel Durio and James O. Chacéré.

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"For the Second Police Jury Ward—Adeline Guidry.

"For the Third Police Jury Ward—Jules Quèbadeau.

"For the Fourth—Robert Burleigh.

"For the Fifth—Ozémé Fontenot and W. M. Prescott.

"For the Sixth—Samuel Haas.

"For the Seventh—Ertelus Lafleur.

"For the Eighth—Eugene H. McGee.

"That the aforementioned police jurors, elected as aforesaid for their respective wards, are all the police jurors to which the parish of St. Landry is legally entitled, and they alone are entitled to exercise the functions and powers of police jurors in and for said parish of St. Landry and for said wards respectively; that the parties aforesaid have been duly commissioned and qualified and as such are in possession of the offices to which they have been elected and are discharging the functions of said offices respectively and are receiving the perquisites thereto attached as of right. That as your petitioner is informed and believes and so believing avers the following named persons have been illegally and wrongfully appointed and commissioned by the Governor of the State to act respectively for the police jury wards below named, and will, unless enjoined, illegally assume to exercise the functions of police jurors and to claim the perquisites thereto belonging, to-wit:

"Dr. Joseph P. Saizan for the First Police Jury Ward; for the Fifth Police Jury Ward Robert Lafleur, and for the Eighth Police Jury Ward, Ollbe Manuel.

"That said appointments are illegal, and said parties aforesaid are not legally entitled to exercise the functions or receive the emoluments as police jurors of said wards respectively, and a writ of injunction should issue in the name of the State of Louisiana to restrain and prevent said Dr. Joseph P. Saizan, Robert Lafleur and Ollbe Manuel from exercising the functions of police jurors of said wards respectively until, after proper proceedings, the disputed right by them to said offices shall have been judicially determined; that E. H. McGee is president of said police jury and he likewise should be enjoined from in any manner recognizing the illegal appointment of said Saizan, Lafleur and Manuel as aforesaid, and should be further enjoined from permitting them to exercise in any manner the functions of police jurors for the aforesaid First, Fifth and Eighth wards respectively, until their right to said offices shall have been

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judicially determined; that the right to the offices above referred to exceed each in value the sum of one hundred dollars. Wherefore, petitioner, in his capacity as District Attorney, and acting herein for and on behalf of the State, prays that writs of injunction do issue in the premises, prohibiting and enjoining the aforesaid Joseph P. Saizan, Robert Lafleur and Olibe Manuel from in any manner acting or assuming to act as police jurors for the above named wards respectively, and that a writ of injunction likewise issue prohibiting the said E. H. McGee, president as aforesaid, from in any manner recognizing the illegal appointment of said parties as police jurors, or permitting them to in any manner act as such until the further orders of your Honorable Court, and that on trial hereof the said writs of injunction be maintained until the disputed rights of said Saizan, Lafleur and Manuel to the aforesaid offices shall have been judicially determined; and petitioner further prays that said Saizan, Lafleur and Manuel be duly cited in the premises, as provided by law; and petitioner further prays for costs and general relief in the premises."

This petition was accompanied by the affidavit of R. Lee Garland that the allegations contained therein were correct and true, and that a writ of injunction was necessary to prevent the acts complained of therein.

The District Judge granted an order upon this petition, as follows:

"The foregoing petition, affidavit and law considered it is ordered that writs of injunction issue as prayed for and according to law."

On the 8th of July the District Attorney filed a petition in the District Court in which, after reciting the petition filed by him as stated, its allegations and its prayer—the action of the District Court thereon ordering an injunction to issue as prayed for and the issuance and service of the injunction on the parties ordered to be enjoined, he alleged that, notwithstanding the issuance and service of the injunction, the parties enjoined, Saizan, Lafleur and Manuel, had each and severally violated the injunction by presenting themselves at open session of the police jury on that day and claiming and assuming to act as police jurors of Wards First, Fifth and Sixth, respectively, and by acting and voting as such, and that McGee, president of the police jury, had likewise violated the injunction and disobeyed the same by recognizing said parties as said police jurors; that in so acting all of said parties had wilfully disobeyed the order of injunc-

tion and committed a contempt of the Governor of the State who made the appointments, of the Senate who confirmed them and of the authority of the District Court and should be punished accordingly. He prayed that the court rule these parties to show cause why they should not be adjudged to have committed a contempt of the authority of the District Court and punished accordingly.

The parties appeared at the time fixed by the court and for answer alleged that they had not been guilty of contempt because the petition for the injunction showed on its face that the court had no jurisdiction, power or authority to issue the writ of injunction, which was therefore absolutely null and void, and therefore no contempt was entailed or incurred by its violation. Because notwithstanding the absolute nullity of the injunction, they had observed the inhibitions of the same until they had applied to the Supreme Court for writs of *certiorari* and prohibition and obtained and had served upon the District Judge and District Attorney the mandate of the Supreme Court. They prayed that the rule be discharged. On the trial of the rule the court ordered and adjudged and decreed that the parties be imprisoned in the parish jail for the space of forty-eight hours, holding that they had been guilty of contempt by wilfully violating the writ of injunction sued out.

On the 10th of July, the parties so adjudged guilty of contempt and relators herein filed a petition in the Supreme Court, in which they averred that after the restraining order issued by that court to the District Judge and District Attorney had been served, Saizan, Lafleur and Manuel presented their commissions and oath of office as police jurors to the police jury of the parish of St. Landry then in session, and were duly recognized as members of said jury by the president thereof, McGee, without objection from the other members of said body. They then reciting the application of the District Attorney for the rule upon them to show cause why they should not be punished for contempt, their answer thereto and the judgment of the District Judge on the trial of the rule, averred that the action of the District Judge and District Attorney was in contempt of the authority of the Governor and of the Senate and of the Supreme Court. That they had deliberately violated the order of the Supreme Court, and that in ordering them to be confined in the parish prison, the District Judge had committed an act of oppression in office and wantonly violated their right of personal liberty. That the act was

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tyrannical and oppressive and called for the exercise by the Supreme Court, in the vindication of its authority, of its powers of punishment. They prayed that the court order that the District Judge and District Attorney be arrested and punished for contempt of court; that a peremptory order issue to them to take no further steps against them in the premises; that they be discharged from prison and that the court should take such further steps as it might deem advisable and effectual to enforce respect for its authority and obedience to its orders and general relief. The District Judge and District Attorney were ordered to show cause on the 2d of November, 1896, why they should not be punished for contempt as prayed for.

On the 17th of July, Saizan, Lafleur, Manuel and McGee filed a petition in the Supreme Court, in which they averred that after having obtained from this court the restraining order directed to the District Judge and District Attorney previously referred to, the said District Judge, [when petitioners attempted to take their seats as police jurors and exercise the functions and duties of their office] at the instance of the District Attorney, issued a rule against them to show cause why they should not be punished for contempt, and on the trial of said rule the District Judge sentenced them to imprisonment in the parish jail for contempt of court, which sentence they were compelled to serve out because of their inability to obtain timely relief from the Supreme Court. That they obtained, however, a rule on said judge and District Attorney to show cause, on the 2d of November next, why they should not be punished for contempt of that court; that this rule was served upon the said parties; that petitioners, relying upon the restraining order and rule for contempt which had been obtained from the Supreme Court, continued to exercise the duties of their office as members of the police jury sitting as a Board of Review, when on the evening of July 15, 1896, they were [at the instance of the District Attorney] again served with a rule for contempt of the District Court for alleged violation of its said injunction. That the District Attorney by applying for said rule and the District Judge in ordering it to issue had been guilty of another breach of the restraining order of the Supreme Court and another contempt of court, and they should be ruled to show cause why they should not be punished therefor. They averred that the order of the District Judge allowing said rule was illegal, null and void—that the judge

was incompetent and without jurisdiction, power or authority to issue it, because of the restraining order of the Supreme Court and because the original injunction was an absolute nullity. They prayed that a rule issue against the said judge and District Attorney for contempt of court and for supplemental writs of *certiorari* and prohibition, and for such further orders and decrees necessary in the premises and for general relief. They annexed to the petition copies of the proceedings in the District Court.

On the same day the Supreme Court at chambers (a *quorum* being present) set aside the last order of the District Judge [directing that a rule be taken on the petitioners to show cause why they should not be punished for contempt] deeming it an infraction of its own restraining order to the said judge and ordered the District Judge to show cause why he should not be punished for the repeated disobedience of its orders which had been brought to its attention.

On the 2d of November, 1896, the District Judge and District Attorney answered.

They averred that in construing and interpreting the writ of prohibition served upon them it was not their intention, purpose or motive, directly or indirectly, to impeach the character, motives or integrity of the members of the Supreme Court, individually or collectively, or to cast any imputation or reflection upon them, nor was it their purpose, intention or motive to disobey said order. That if failure there was to observe the same, it resulted from a misconception on their part of the extent and scope of the order. That they understood said order to mean that all proceedings in the suit in which it had been obtained would be stayed until a final hearing of all parties before the Supreme Court as was announced therein; that they solemnly declare that they never for one moment entertained the idea that the order was intended to operate as a dissolution or suspension of the order of injunction invoked by the District Attorney and issued by the District Judge. That when informed extra-judicially by counsel for relators that they contended for such construction of the restraining order of the Supreme Court, they examined the matter carefully and came to the honest conclusion (even though it might be a mistaken one) that the construction contended for was not tenable. The District Judge averred that in punishing the parties for contempt he had acted without any feeling whatever other than to secure obedience to the rules of law

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and the orders granted by him in virtue of his office. They averred that as soon as the order commanding them to desist from any further proceedings in the matter was served upon the District Judge, they forthwith discharged the last rule against the defendants, and this course they would have pursued in the first instance had they understood the order to mean what the Supreme Court subsequently informed them it did mean. They declared that, "knowing as they did that a government like ours rested alone upon the obedience to the law, and that its supremacy is the only bulwark and safeguard for every civil right, they never intended to set up so pernicious an example as to place themselves in contempt of the authority of the Supreme Court, and that they reiterated, under the solemn sanctity of their official oaths, the disclaimer which they made in the first part of their answer." They prayed they be adjudged not guilty of contempt of court, and that the rule be discharged.

The opinion of the court was delivered by

NICHOLLS, C. J. An argument has been filed in this court touching the legal effect of our restraining order—the object, we presume, being to show that the District Judge had reasonable ground upon which to have placed the construction he did upon that order.

It is said that "at the time the order issued relators were effectually enjoined by the decree of injunction. The restraining order of the Supreme Court was issued to sustain the *status quo* and to restrain the District Court from further cognizance of the case except to maintain the *status quo*. In order that this be maintained it was the duty of the District Court to let things remain as they were—both parties, plaintiff and defendants, being held in suspense—neither being allowed to do any act which might in any way detract from the *status quo*. The plaintiff in injunction was to remain motionless in the position which he had acquired by the proceedings actually had, and to make no move of an aggressive character against his adversary. On the other hand, defendants, who had been effectually enjoined from proceeding any further, were still left under the operation of the provisional writ of injunction. They were bound to continue to respect the provisional writ of injunction unless the Supreme Court intended by issuing the restraining order to pass at once on the validity of the injunction writ and to dissolve it

ex parte. Did the court intend to pass finally on the merits of the injunction or the validity of the provisional writ of injunction? Did it intend to do so *ex parte* without hearing what the judge *a quo* and the party plaintiff had to say in vindication of its issuance? By no means. No restraining order could have such an effect, for then there would be a misnomer in terming it a restraining order, since, instead of restraining for the purpose of maintaining the *status quo* and preventing all parties from altering it, there would be a retro-active order of an aggressive character amounting to a decree setting aside a judgment already rendered—a provisional judgment of injunction, it is true, but a judgment which, under the well-established jurisprudence, can not be dissolved by the judge without first giving previous notice to the party who obtained the writ. The restraining order accompanying the writ of *certiorari* is intended simply to maintain the *status quo* before the date of the issuance of such order. It must not be confounded with the action of the court to dissolve the injunction.”

“The duty of the District Judge was, under the restraining order, to maintain the cause in the state in which it was at that moment, and this necessitated the maintenance intact of the provisional order, and when the defendants, seeking to take advantage of the restraining order as understood by them, were taking aggressive steps to undo and nullify the writ of injunction it became the imperative duty of the District Judge to prevent them from doing an illegal act forbidden by him. This the District Judge could only do by proceeding on rule to punish for contempt, and in doing so he was far from being in contempt of the Supreme Court.”

When we set aside the last order issued by the District Court (issued by it after it had itself been served with the restraining order from us), ruling the defendants in injunction to show cause why they should not be punished for contempt, we passed upon and decided adversely to the position taken by the District Judge in the argument made on his behalf. The petition to the District Court for the injunction called in question the power and authority of the Governor and the power and authority of the Senate. The injunction was granted and the effect of that order was to immediately paralyze the action of the Executive and Senate. The application to this court for writs of prohibition and *certiorari* called in question the absolute want of power, jurisdiction and authority of the District Judge himself to bring about such a condition of things.

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After careful consideration of the matter submitted we issued the restraining order referred to, evidencing the fact that a strong *prima facie* showing had been presented against the power and authority assumed by the District Judge. The District Judge was notified that *his own power and jurisdiction was at issue*. The order to him was clear and unambiguous. He was ordered to proceed no further in the matter. It was his duty to obey. There is no question before us [as matters now stand] as to what effect the restraining order had upon the injunction, or as to what the duty of defendants in injunction was in respect to the matters enjoined after our restraining order had issued to the District Judge. We are dealing exclusively now with the duty of the District Judge himself under the latter order. If the restraining order left the injunction intact as claimed and the action of defendants violated the alleged resulting *status quo* which was brought about by it, their act (on that hypothesis) was a contempt not of the District Court, but of this court, and was to be punished by ourselves and not by the District Judge.

If the District Attorney believed that the defendants had been guilty of contempt he should have addressed himself to us and not to the District Judge, and the latter should have at once declined acting when himself appealed to. This matter we think would have been clear enough had it been coolly, temperately and judicially approached and dealt with. The case is obviously one in which strong political feelings and antagonisms have been developed, as shown by the pleadings and briefs of the parties—parts of which on both sides are not to be commended and have not been quoted. We accept as true the declarations made by the District Judge and District Attorney that their course was not actuated by any designed or intentional disrespect of this court or any of its members, but none the less the fact remains that our order was disobeyed. We can not accede to respondents' prayer that they be adjudged not guilty, and that the rules taken here be discharged. They were unquestionably guilty of contempt of court and we so adjudge them. We can not permit this matter to pass uncensured.

Having disposed of this preliminary question we next direct our attention to the writs of prohibition and *certiorari* which we ordered to issue. The first proposition advanced by the respondents is that relators invoked a wrong remedy—that prohibition as its name implies is a writ for the purpose of preventing not of annulling, and

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that in this case the matter sought to be prohibited was an accomplished fact—as the relators were already effectually enjoined and they could only be released from the effect of the same by regular proceedings to dissolve in the District Court. That the writ of *certiorari* as applied for is merely an ancillary writ intended to bring up the record for the purpose of passing upon the application for a prohibition. We have ourselves stated that the object of the writ of prohibition was to prevent further action in a case where jurisdiction, power and authority to act is denied, and declared that it was the function of the writ of *certiorari* to undo matters which had taken such a shape as not to be remedied by the writ of prohibition. It is true that in this instance the injunction asked for had been granted, and that nothing further having been asked for by the plaintiff in injunction that particular proceeding was at an end, but none the less that injunction could well be made the basis of future action by the court itself which granted it. The proceeding for contempt taken in the matter before the District Judge, shows that there might be necessity for a prohibition to be directed to him, but granting that the condition was such as not to be properly reached by the particular writ applied for it would not follow that relator should be thrown out of court. There is an idea prevalent in this State arising from the fact that prior to the Constitution of 1879 the writ of *certiorari* was almost exclusively made use of for the purpose of the correction of errors in transcripts of appeal; that it has no greater scope, but this is a mistake—it is a substantive and far-reaching corrective writ concurrent with and frequently taking the place of the writ of prohibition. In the exercise of our supervisory jurisdiction we are not rigidly tied down by form. When the facts of a given case being recited present a case for relief by us under that jurisdiction and there is a prayer for such orders and decrees as those facts will justify and for general relief, we will not remit the relator to new, expensive and unnecessary and sometimes fruitless remedies simply by reason of a mistake in the writ specifically asked for.

Defendants' next contention is that the matter in dispute being over one hundred dollars and not shown to be over two thousand dollars a case is presented where the question of jurisdiction should be primarily determined by the Court of Appeals, as it would be one within its appellate jurisdiction, and it should only reach this court after the case had passed through all the different stages of an ordi-

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nary suit and the ultimate result reached was against the exception or plea to the jurisdiction.

We have on a number of occasions held that we would not as a general rule detach or split off an exception of jurisdiction from the case in which it was an incident and decide it in advance of the final judgment in the case, but that proposition was simply the enunciation of a general rule subject to be departed from in exceptional or extraordinary cases. We do not find in the present case any occasion for the application of the rule which respondents invoke. What was the issue raised by the District Attorney in the District Court and what was the result reached on his application? The argument has been made to us on behalf of the respondents that with the application for the writ of injunction and the granting of the injunction the case of the District Attorney was ended, and that is true. The District Attorney sought to go further in that case than to obtain the injunction itself, and this being granted to force relations into the position of being plaintiffs in a new suit to have themselves recognized as entitled to the positions to which they had been appointed. The District Attorney (even were he authorized to raise such an issue) did not seek to have it decreed in that particular proceeding contradictorily with the defendants that they were not entitled to their offices, nor did he cite them into court for that purpose and to have the appointments declared null as having been made by the Governor and confirmed by the Senate without authority. What he claimed was that the Governor was absolutely without legal power to make the appointments, and that upon his suggestion of that fact to the District Court it had the power at once to paralyze the action of the executive until the appointees should themselves have instituted legal proceedings to have themselves declared rightfully entitled to the offices and should have sustained their right thus collaterally attacked. If the defendants had answered the injunction, what would have been their plea? Evidently that the court was without power or authority to thus summarily, by injunction, set aside the Governor's action, paralyze it until his appointees should as plaintiffs have been able to have that action judicially vindicated. The issue involved would be the District Court's power in the premises, not the powers of the Governor and the Senate. If the District Court, on an exception taken as to its power, had determined that it had such power, and the matter had

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been appealed to the Court of Appeals, what issue would have been before that court? Simply the issue of the power and authority of the District Court in the premises, nothing more. There would be no existing suit involving issues in which the question of jurisdiction would be incidentally raised as leading up to the decision of other questions; the very beginning and ending of the suit would be the question of the jurisdiction and power of the lower court. We see under such circumstances no reason to permit this question to be sent primarily for decision to the Court of Appeals. The "matter in dispute" is not measured by the amount which the District Attorney has declared to be the value of the office of police juror. The question at issue is the power of the judiciary to summarily and positively check by injunction the exercise of the powers of the executive department. A more important question than this can scarcely arise, and is not to be disposed of in determining the jurisdiction of this court simply by reason of the value of the particular office which *furnished the occasion* from which arises a contest as to the powers of the two departments. The District Attorney does not pretend that in the particular proceeding to which he has resorted, the right of the defendants to their offices was to be therein litigated. The suit is not before us as one in which the rights of private individuals are challenged, and in which the jurisdiction, power and authority of the District Court to deal with those rights is called incidentally in question. We are not asked to dissolve the injunction, but to discharge it.

The next position contended for is that, inasmuch as there is a class of cases in which the judiciary is authorized to pass upon the legality and illegality of particular acts of the executive, and inasmuch as the District Attorney, a constitutional officer, had, under oath, declared that in the matter of the appointments of the three police jurors appointed from St. Landry the Governor's action was illegal, the District Court had authority to take cognizance of the cause and to grant the order it did. That if there was any want of proper allegation in the petition it was a matter for exception or demurrer, and not for direct and immediate action by this court, as one involving the power and jurisdiction of the lower court.

We had occasion in *State ex rel. Kuhlman vs. Judge*, 47 An. 57, and *State ex rel. Keller vs. Judge*, 47 An. 61, to examine into and pass upon an objection of the same character. We see no reason to

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change the views therein expressed. This case, as to the pleadings of the District Attorney, is as much (in fact more) open to objection as the pleadings in those cases, and the relief asked for is more sweeping and radical than was there asked. Here there are no opposing private interests sought to be protected; the District Attorney does not pretend to have been solicited by any one to institute the proceedings; he declares himself as acting for and on behalf of the State solely by virtue of his office. He has inaugurated, of his own motion, proceedings calling in question the power of the Governor and the Senate—the power of the Governor having been exercised, so relator's petition declares (and the fact is not denied), under an official opinion delivered by the Attorney General, the highest law officer in the State in the prosecution of the interests of the State. It is the bounden duty of the judiciary to give some force and effect to the acts of the executive. His acts are not to be presumed illegal and utterly wrong, particularly upon a mere conclusion of law announced by a District Attorney. The parties enjoined in this case had not gone into office under their commissions; they had not usurped the office, but before they had taken any steps whatever they were ordered and forced (as we have said), as plaintiffs, to primarily vindicate their rights and the authority of the executive in a new suit. The District Judge reversed the presumptions as to the validity of the Governor's action and threw the judiciary department into immediate and direct clash with the executive department. Without any bond the exercise of functions of public functionaries has been put an end to. If a District Court can upon a mere declaration by a District Attorney that the Governor has illegally appointed a police juror [before that officer has taken his seat] successfully enjoin him from exercising his functions until he shall have brought suit to establish his right, and shall have established his right, the District Court could with equal propriety, upon a mere declaration of a District Attorney that the Governor had illegally appointed a District Judge or any other officer, enjoin him from qualifying, and thus bring about absolute confusion in the administration of public affairs. In the Kuhlman case we referred approvingly to *Beebe vs. Robinson*, 52 Ala. 66. The views of the Supreme Court of Alabama, expressed in that case, still command our approval.

The opinion we deliver to-day does not touch the legality or the

State vs. Meaux.

illegality of the action of the Governor in appointing the relators to the office of police jurors. That matter is left open. All that we decide now is that the District Court was without power or authority by injunction to tie up the relators in the exercise of the functions by anticipation, and to force those parties to remain powerless to act until as plaintiffs they had first affirmatively shown the authority of the Governor to make the appointments. See, on this subject, *State ex rel. Cheevers vs. Duffel*, 82 An. 658.

For the reasons herein assigned, it is hereby ordered, adjudged and decreed that the writs which issued herein be perpetuated, and that the injunction granted by the District Judge of the Eleventh Judicial District Court in and for the parish of St. Landry, in the matter of the State of Louisiana *ex rel. R. L. Garland*, District Attorney, vs. *Joseph P. Saizan et al.*, No. 15,853 on the docket of that court, be and the same is hereby set aside and discharged.

No. 12,224.

STATE OF LOUISIANA VS. AZARIE MEAUX.

48 1517
48 1570

See *State vs. Riesz*, ante, p. 1446.

A PPEAL from the Eleventh Judicial District Court for the Parish of Acadia. *Dupré, J.*

M. J. Cunningham, Attorney General, *R. Lee Garland*, District Attorney (and *P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

Philip S. Pugh and *E. P. Veazie* for Defendant, Appellant.

Submitted on briefs November 7, 1896.

Opinion handed down November 30, 1896.

Rehearing refused December 17, 1896.

The opinion of the court was delivered by

MILLER, J. The accused, sentenced for lying in wait, armed, with intent to murder, appeals, and relies for reversal of the sentence on

State vs. Shelby.

his motion to quash the indictment, and the bill of exceptions to the action of the court overruling it.

The motion was on the ground that the judge of the lower court *ex proprio motu* discharged a member of the grand jury, substituting another in his place, and on the further ground that those who composed the trial jury were additional jurors drawn in the middle of the term to serve another week. It appears the discharge of the member of the grand jury was because he was found to be disqualified, and the additional venire was drawn because it was impossible to dispatch the criminal cases before the court without the new drawing of jurors.

The questions presented by the motion to quash have received our attention in other cases recently decided. For the reasons given in the cases of the State vs. Wright, 41 An. 600; State vs. Riez, *ante*, page 1446; Act No. 89 of 1894, Sec. 7, it is ordered that the sentence of the lower court be affirmed.

No. 12,316.

THE STATE VS. NED SHELBY.

See State vs. White, *ante*, p. 1444.

A PPEAL from the Twentieth Judicial District Court for the Parish of Assumption. *Guion, J.*

M. J. Cunningham, Attorney General, and *G. A. Gondran*, District Attorney, for Plaintiff, Appellant.

Pugh & Pugh for Defendant, Appellee.

Submitted on briefs November 21, 1896.

Opinion handed down November 30, 1896.

The opinion of the court was delivered by

MILLER, J. This is an appeal by the State from the judgment sustaining the motion to quash, united with a demurrer to the indictment, on the ground that the Sec. 792 of the Revised Statutes on

48 1518
50 682

48 1518
109 239

State vs. Brooks et al.

which the prosecution is based was repealed by the Act No. 59 of 1896. The demurrer and motion to quash were sustained without putting the accused on his trial.

For the reasons assigned in the opinion in *State vs. White*, ante, page 1444, it is ordered, adjudged and decreed the judgment sustaining the motion to quash is avoided and reversed, and the lower court is directed to proceed with the trial of the accused.

No. 12,253.

STATE OF LOUISIANA VS. ARTHUR BROOKS ET AL.

The discharge by the court of a grand juror not qualified to serve, affords the accused no cause of complaint, the disqualified juror not participating in finding the indictment against the accused. Wharton's Criminal Law; *State vs. Causey*, 43 An. 897.

APPEAL from the Eleventh Judicial District Court for the Parish of St. Landry. *Dupré, J.*

M. J. Cunningham, Attorney General, and *R. Lee Garland*, District Attorney, for Plaintiff, Appellee.

John N. Ogden for Defendant, Appellant.

Submitted on briefs November 7, 1896.

Opinion handed down November 16, 1896.

The opinion of the court was delivered by

MILLER, J. The only question in this case of an appeal from the sentence of defendant for robbery is that arising by the exclusion of one of the grand jury directed by the lower court because the juror was ascertained not to be qualified to serve. He did not participate in the finding of the indictment.

It was the duty of the court to purge the jury of disqualified jurors, and no cause of complaint was thereby afforded the defendant. *State vs. Causey*, 43 An. 897, and *State vs. Riez*, ante, p. 1446.

It is therefore ordered, adjudged and decreed that the sentence of the lower court be affirmed.

Succession of Levy.

No. 12,265.

SUCCESSION OF ALPHONSE LEVY.

While the Supreme Court recognizes the right of persons having exclusive interests in a particular matter to make such compromises and agreements concerning the same as to them may be deemed advisable, provided they be not contrary to the law, it can not be controlled by stipulations and agreements relatively to subjects in which third persons may be concerned. If the judgment of the District Court fixing an amount of an administrator's bond be legally correct, the Supreme Court could not reverse it and remand the case with directions as suggested by the parties to the proceeding which provoked the judgment appealed from.

Where a notary taking an inventory of the effects of a succession has failed to follow the requirements of Art. 1107 of the Civil Code that he should note the distinction between property which the deceased owned entirely, and that in which he simply had an interest, it can not be required in order to qualify as administrator of the succession that bond be furnished to an amount one-fourth beyond the estimated value of the effects belonging wholly to the deceased, and also to the estimated value (as fixed in the inventory) of the properties in their entirety which belong to commercial partnerships and joint stock companies in which he had an interest.

Article 1041 of the Civil Code, which provides that "as soon as the inventory or inventories of the succession are finished, the judge shall name an administrator to manage the property thereof and oblige him to give bond and sufficient security for the fidelity of his administration, unless the administrator prefer to furnish, instead of this security, a special mortgage on unincumbered property of a value sufficient to serve as a guarantee for his administration," justifies the exercise of judicial discretion in determining under some circumstances and to some extent the amount which an administrator should presently furnish as a guarantee for his administration, the amount so fixed being liable to be increased as changing conditions call for.

A PPEAL from the Eleventh Judicial District Court for the Parish of St. Landry. *Perrault, J.*

H. L. Garland and Bernard Titcher for Lazare Levy, Plaintiff in Rule, Appellant.

E. D. Estillette, for Creditors, Opponents, Appellees.

Argued and submitted December 14, 1896.

Opinion handed down December 19, 1896.

Succession of Levy.

This case was before the court upon the following agreed statement of facts:

" Alphonse Levy died in St. Landry where he resided in February, 1896.

" He had business relations as partner, with several persons, as joint owner with others, as member of stock companies, etc.

" His partners Julius Meyers of J. Meyers & Co., and Mentor Andrus of Sunset Mercantile Company, Limited; Lazare Levy of Lazare Levy & Bros., have obtained by orders of court possession of the assets of said firms, and other persons, to-wit: W. W. Duson and Eraste Durio, have possession of the properties belonging to the stock companies by virtue of their rights as managers, etc.

" Inventories were made in several of the parishes of the State wherein Alphonse Levy had properties belonging to him separately or with others as partners, joint stock company, etc. Lazare Levy, who was his heir at law, applied to be appointed administrator of the estate of Alphonse Levy.

" The inventories taken included all the properties in which Alphonse Levy had an interest, and their amount aggregated three hundred and forty-two thousand nine hundred and eighty-six dollars.

" With the exception of the individual properties of Alphonse Levy included in these inventories, and the aggregate value of which is twenty-eight thousand nine hundred and twenty-nine dollars, all of the properties inventoried are in the possession of the liquidators, managers and co-proprietors entitled to administration, etc.

" These have actual or constructive possession of said properties.

" To qualify as administrator of the estate of Alphonse Levy, Lazare Levy took out a rule to have the court determine the amount of bond which said administrator should give.

" The rule was served on the attorney of the absent heirs, who put the matter at issue by filing a general denial. Creditors (to-wit: St. Landry State Bank; H. & C. Newman; Hyman, Hiller & Co.) intervened in the rule and opposed the fixing of the bond for less than one-fourth over amount of inventories.

" The St. Landry State Bank, H. & C. Newman and Hyman, Hiller & Co. intervened in the rule and opposed the application. The attorney of absent heirs pleaded the general issue.

Succession of Levy.

"The twenty-eight thousand nine hundred and twenty-nine dollars is the aggregate of valuation of separate individual properties of estate of Alphonse Levy which the administrator would be put in charge of.

"Lazare Levy, as surviving partner of Lazare Levy & Bro., has been put in possession of all the assets of said partnership, amounting to one hundred and seventy-one thousand dollars."

In the rule taken out by Lazare Levy, referred to in the above statement, his prayer was that he be permitted to qualify as administrator of Alphonse Levy on furnishing a bond "fixed on the basis of twenty-eight thousand nine hundred and twenty-nine dollars and sixty cents, the aggregate valuation of appraised properties with which petitioner is to be entrusted."

The court dismissed the rule, stating "the law was plain that the bond of the administrator should be for the amount of the inventory of the estate plus one-fourth over and above said amount, deducting bad debts. The inventories showed the assets of the estate of all kinds, movables, immovables, rights and credits far exceed twenty-eight thousand nine hundred and twenty-nine dollars, and consequently the court was without power to accept a bond differing from the provisions of Art. 1048 of the Civil Code."

Lazare Levy, the mover in the rule, appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. The succession of Alphonse Levy, although opened in February, 1896, has remained up to the present time without an administrator, though the properties of the various partnerships, corporations and joint companies in which the deceased had an interest had been placed by the court in the hands of liquidators, etc. Who has had, up to the present time, the custody of the property other than those so administered, which belongs directly to the deceased, does not appear. Lazare Levy declares he has accepted the succession as beneficiary heir; it is possible and probable that he has had charge in that capacity. C. C. 996, 997, 998.

The presumptive heirs in Europe do not appear to have taken any steps themselves in the way of either acceptance or renunciation of their brother's estate, nor have creditors made any move to force them to declare their intention in that respect.

Succession of Levy.

The inventories which have been taken are doubtless correct as inventories of the property of the different partnerships and stock companies in which the deceased had an interest (C. C. 1103, 1188, 1139); but the notaries who took them do not seem to have complied with Art. 1107, which requires them to make a distinction between properties held in entirety by the deceased, and that which belonged to him in part only. There should have been an estimate made of the value of the present or eventual interest of the deceased in such properties.

An administrator is responsible, not simply for the property in his possession and under his direct administration, but for a proper legal supervision over the administration of that in which the succession has an interest by those who have primarily the administration thereof and who are primarily responsible for the same. The extent of this responsibility may be hard to fix and determine, but none the less it ought to enter as a factor in the determination of the amount of the bond the administrator should give. It is a variable, a fluctuating and not a constant factor, and the amount can be added to from time to time as the court directs. It is obvious that the property of this succession should be placed under the charge of some person authorized to that effect by the court. Since this case has been submitted for decision, a motion has been made by all parties that we reverse the judgment of the lower court, and remand it with directions to the District Judge to grant the application made by Lazare Levy to be permitted to qualify as administrator upon giving security as proposed to be given by him. While we recognize the right of persons having exclusive interests in a particular matter to make such compromises and agreements concerning the same as to them may be deemed advisable, provided they be not contrary to the law, we can not be controlled by stipulations and agreements relatively to subjects in which third parties may be concerned. If the judgment of the District Court was really legally correct we could not reverse it and remand the case with directions as suggested (Succession of Hardy, 46 An. 1309). We are, therefore, to inquire whether the District Judge, in reaching his conclusions, did not give too rigid an interpretation to a particular article of the Code, leaving other articles out of consideration.

Article 1048 of the Civil Code unquestionably declares, that "the security to be given by every administrator appointed under that

Succession of Levy.

article should be one-fourth beyond the estimated value of the movables and immovables and of the credits comprised in the inventory exclusive of bad debts;" but this does not mean that the inventories, as made, should conclusively fix and determine the amount of the security. If they are obviously defective as succession inventories, they are not absolute guides. In the case at bar to require a bond to be given to cover all the properties of all the partnerships and companies in which Alphonse Levy has an interest would practically be prohibitive of an administration of the succession, or lead to ruinous charges by way of administration commissions.

The District Court was clearly wrong in exacting the giving of such a bond. While Art. 1048 fixes the amount of the security to be given as therein provided, Art. 1041 seems to contemplate that there might exist a condition of things such as to allow some flexibility in the court in its decision as to the full amount. The variable factor we have mentioned is one which justifies the exercise of judicial discretion in determining to some extent the amount which an administrator should furnish as a guarantee for his proper administration (*Labranche vs. Trepagnier*, 4 An. 560), the amount so fixed being liable to be increased as changing conditions will call for.

If there were no one willing to take upon himself the duties and obligations of "regularly appointed administrator" of this succession (if we may so express ourselves) a question might arise whether we could not and might not be called upon in the exercise of our equitable powers to place its property in charge of a custodian or provisional administrator under temporary special bond as the court has sometimes deemed itself authorized to do in matters of abandoned property of corporations.

In the succession of *De Flechier*, 1 An. 21, one *Domingon*, who had been appointed administrator of that succession on condition of his complying with the requirements of the law, having assumed the administration without giving security as required, *De Flechier*, a beneficiary heir, alleging said fact, moved that he be dismissed from office. The fact alleged having been established, *Domingon* was removed, and the court forthwith, without advertisement, appointed *De Flechier* in his stead. *Domingon* appealed. On appeal the judgment was affirmed. In its opinion, the court said: "The appellee (*De Flechier*) was one of the beneficiary heirs of the deceased, and

State vs. Wright et al.

was a person to be preferred by the judge in selecting an administrator in place of the one removed (Old C. C. 1085; Rev. C. C. 1042). On the removal of the administrator it was necessary to appoint some one to take charge of the effects of the succession. The selection made by the judge we think a proper one. He appointed the appellee, and his appointment can stand provisionally until an application be made for the appointment of a regular administrator under the forms required by law, which, in a succession like this, we trust, will not be necessary."

It is enough for us, at the present time and on the issues made, to say that the judgment appealed from, as rendered, is erroneous.

For the reasons herein assigned, it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed, and the cause is remanded to the District Court for further proceedings according to law.

No. 12,225.

STATE OF LOUISIANA VS. JOHN WRIGHT ET AL.

Not only error but injury must be alleged and shown to justify the reversal of a judgment. State vs. Kennon, 45 An. 1196.

Affirmative showing should be made to the Supreme Court to enable it to see for itself whether the testimony admitted and declared to be irrelevant would be likely to produce injury and to enable it to say in point of fact it was irrelevant.

In a criminal case it is improper to ask a witness if an offer had not been made to compromise the case. The rule in civil matters is applicable in criminal matters — i. e., that mere proposals for a compromise or negotiating to effect one, are not generally admissible, though evidence may be given of any fact or distinct liability admitted in the proposals, negotiations or conversations, the party sought to be affected being entitled to the benefit of the whole conversation or proposal. This court again affirms that "when there is a difference between the judge and the counsel as to the circumstances connected with the bill of exceptions the statements of the former are to be taken as true." State vs. Underwood, 44 An. 852.

In preparing bills of exception the prosecuting officer and the counsel for the accused should each make recitals of what the facts testified to were, and not deal in sweeping declarations on the one hand that the cross-examination was clearly within the limitation of the law, and on the other hand that it was not. The court, standing thoroughly impartial between the State and the prisoner should make its own recital of the testimony and not send cases up resting for decision upon mere conclusions of its own on that subject.

A PPEAL from the Eleventh Judicial District Court for the Parish of Acadia. Dupré, J

48	1525
112	874

48	1525
1124	617
1124	618

State vs. Wright et al.

M. J. Cunningham, Attorney General, *R. Lee Garland*, District Attorney, for Plaintiff, Appellee.

Philip S. Pugh and *Charles Belden* for Defendant, Appellant.

Submitted on briefs November 7, 1896.

Opinion handed down November 30, 1896.

The opinion of the court was delivered by

NICHOLLS, C. J. Accused (John Wright, Adam Wright and William Wright) were tried and convicted of petty larceny, and having been sentenced to one year's imprisonment in the penitentiary, they have appealed.

They rely on a motion on which they sought to quash the *venire* and challenge the array of jurors, and upon several bills of exception taken to rulings of the District Court with reference to the introduction of testimony. The motion referred to is based upon the same grounds which were taken in the case of **State vs. Thibodeaux*, recently decided, and therein held not well founded. The decisions in these cases control to that extent the present one.

*The case of the State of Louisiana vs. Thibodeaux, No. 12,226 of the docket of the Supreme Court, did not become final until January 4, 1897; the opinion will appear in 49th Annual. The following is the syllabus:

1. The jury law of 1894 authorizes a trial judge, when, in his discretion he thinks it necessary and proper, to require the Jury Commission to select additional jurors for service, either as regular jurors or as talesmen, and they shall be summoned without delay, or within such time as the judge may indicate; and interpreting a similar law, this court held this to have been a proper exercise of legislative authority and a sound public policy.
2. In a motion for a new trial only such matters can be availed of as shall have transpired during the progress of the prosecution, and its refusal because of alleged nullities in the proceedings not adverted to during the trial, nor brought to the attention of the jury, will not be reviewed by this court.
3. The use of the words "then and there" in an indictment for perjury are not so sacramental that they shall appear in exact conjunction therein and being separately employed in the same sentence of the portion of the information charging the taking of the false oath, it will be deemed sufficient.
4. In such an indictment it is not essential that the authority and jurisdiction of the court administering the oath should be expressly averred if they sufficiently appear from the facts set forth; and when the presentation for perjury is in the same court in which the perjury was committed it may take judicial cognizance of its own jurisdiction if the indictment sufficiently sets forth the facts.—REPORTER,

State vs. Wright et al.

In the first bill of exception it is recited that one of the defendants (*John Wright*) being on the stand, he was asked by counsel for the State "whether he knew whether on Thursday night *Adam Wright* (another of the defendants) had a calf tied to the fence back of his house;" that counsel for defendant objected to the question on the ground "that while defendants were charged with stealing a calf from one *Simon* a day or two after the Thursday alluded to, there was nothing to connect the calf tied to the fence with the calf stolen, and the question was irrelevant; and for the further reason that defendant had not been examined in chief on that subject, and could not be cross-examined thereon, same being new matter. Counsel claimed that the evidence showed no direct evidence that *Adam* and *William Wright* (defendants) participated in the taking of the calf alleged to have been stolen, they having simply "helped *John Wright*, then running a butchery, to butcher the calf, and one *Simon* having brought up the calf from the pasture." That the testimony showed that *John Wright* had tried to buy another calf from one *Quebodeaux* that morning; that the question asked had a tendency to injure *Adam Wright*, and prejudice the jury against him." The court declared in the bill that the evidence, as a matter of fact, was brought out on the examination in chief, and was not new matter; that there was proof that one of the defendants had a calf tied to the fence on the Thursday referred to; that all the defendants participated in the larceny, and the pleas that they were innocent agents of each other found no favor with the jury."

The second bill recites that the same witness was asked on cross-examination by the State: "Did you tell *Adam Simon* in presence of *Anding*, on the day of your arrest, when you were going with the deputy to get your brother *George*, that *Adam Simon* had nothing to do with the stealing of the calf, and he (*Adam*) did not know but that you bought the calf from *Brewer*?" that objection was made to the question for the reason that it had not been brought out on direct examination; also because it incriminated the witness, who could not be made to incriminate himself, and that it was irrelevant and inadmissible. The court states that "the question was asked the witness for the purpose of contradiction; that the question had been divided, and witness had already answered that he had gone with the deputy sheriff to get his brother *George*, and balance of question was put when objection was made to the latter portion;

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objection was made to first question as well as second one. Adam Simon while on the stand as a witness for the State did state, in his examination in chief, that *John Wright*, in presence of Anding, on the day of his arrest, at the time and place in question, above objected to, that he and Adam Simon had nothing to do with stealing the calf and knew nothing about it, and the question was allowed because it tended directly to rebut and disprove the theory of the defence, the defence maintaining that Adam Simon, the witness on the stand, had himself stolen the calf, and that they were only innocent agents assisting in the butchery, and did not travel beyond the examination-in-chief, but on the contrary, was directly in line with the same. Furthermore, the question was permitted to be asked to shake the credit of the witness and to contradict him out of his own mouth by showing previous contradictory statements."

The third bill recites that the same witness (*John Wright*) was asked by the State on cross-examination whether *Adam Wright* had offered to compromise the case; that the question was objected to by counsel for defendant, as same had not been brought out on direct examination; that the question was irrelevant and inadmissible and would tend to prejudice the jury against *William Wright*. The court allowed the question "because the answer tended to show the motives of *Adam Wright*, and to show the relation *Adam* bore toward the crime, *Adam* himself being one of the parties charged in the indictment with the stealing. The subject had been fully brought out in chief, because *Adam* had set up through the same witness the defence that he was an innocent agent, and cross-examination went directly to break down and impeach his direct examination on this point."

The fourth bill recites that the witness *John Wright* was asked, on cross-examination by the State, "whether there was any excursion to the Gulf to which he was to furnish meat about the time the calf was alleged to have been stolen;" that the question was objected to on the ground that same had not been brought out on direct examination, and consequently was irrelevant and inadmissible. The court stated: "The question was elicited on the examination in chief to show that *Adam* alone was interested in the butchery, the other defendants protecting themselves under the plea of innocent agency. The question was asked to show the true relation of all the defendants toward the crime, which was that *John Wright* made

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arrangements to sell the meat to the Gulf excursionists, and after this was arranged all the defendants joined together and stole the calf. On this line the evidence did not transcend the limits of examination in chief, but, on the contrary, was directly in line with it."

In *State vs. Kennon*, 45 An. 1195, referring to the bill of exceptions reserved in that case, we said: "The bill states that the District Attorney was permitted, over the objection of the accused, to ask him a certain question, but it goes no further: whether the question was asked or not; whether, if asked, the accused refused to answer it or not; what he answered (if he did answer) is not stated. It may well be that the accused answered the question, saying he had never been a fugitive from justice, and may have so stated perfectly consistently with the truth. In other words, even though the question may improperly have been permitted to be asked, the permission to ask may have resulted in no injury. Not only error, but injury must be alleged and shown to justify the reversal of a judgment. Appellant has alleged error, but has not alleged or shown injury."

The present case stands before us in the same situation as did that of the *State vs. Kennon*. We are not informed what answers were made to the questions stated to have been improperly permitted to be asked. It not infrequently happens that an improper question elicits an answer directly the reverse of that which the questioner expected. Granting, however, that in this case answers were given such as the questioner expected, we are unable to say from the bill what influence or effect the answers would have had upon the jury. (See on this subject 63 N. W. 447.) The principal complaint urged is that of irrelevancy and inadmissibility. Irrelevancy, as we have heretofore said in 47 An. 4, *State vs. Dixon* (particularly in Louisiana in criminal matters, where the whole evidence is not brought up), is a weak objection—not that irrelevant testimony may not sometimes be in point of fact very prejudicial testimony before a jury when permitted to go to it. We would, however, in the absence of a recital of facts and a recital of the condition of the case as to the testimony, actually elicited in it naturally assume that irrelevant testimony would (as it should not) have any weight with the jury. Permission by the court to introduce testimony as against an objection of irrelevancy would carry with it primarily the presumption that the condition of the evidence

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was such as to justify and authorize its admission. An affirmative showing should be made to this court to enable it to see for itself whether the testimony declared to be irrelevant would be likely to produce injury and enable it to say that it was, in point of fact, irrelevant. One of the objections urged by the defendant is that a question was permitted to be asked concerning a calf tied to a fence on a certain Thursday night when there was nothing to connect the same with that alleged to have been stolen. Whether there was or there was not evidence connecting the two is a matter of fact of which we have no knowledge. The statement is a conclusion of the accused which may have been entirely wrong, but while there may have been at that particular time no connection shown—such connection, we presume, would have been, at least, attempted to be shown later. There was no motion made to strike out the testimony (*Rice on Criminal Evidence*, Sec. 258 *et seq.*). The State is not tied down absolutely in the order of its proof. If no connection was shown the result, doubtless, was that the matter inquired into worked no harm. The bills of exceptions taken are, some of them, taken in the name of the defendants generally; others, simply in the name of the "defendant," without specifying the particular defendant excepting. Where there are several defendants, bills on behalf of a particular defendant should specially give his name. While the view we have taken of this case makes it unnecessary for us strictly to express any opinion on the subject it may be well to say that one of the questions asked of John Wright, when on the stand (the question as to whether or not Adam Wright had not offered to compromise the case) should not have been asked. What answer was given to that question we do not know, but in civil matters it is a rule that mere proposals for a compromise or negotiations to effect one, are not generally admissible, though evidence may be given of any fact or distinct liability admitted in the proposals, negotiations or conversations, the party sought to be affected being entitled to the benefit of the whole conversation or proposal. *Delogny vs. Rentoul*, 2 Martin, 175; *Agricultural Bank of Mississippi vs. Barque Jane*, 19 La. 1. We see no reason why this rule should be less applicable in criminal matters. Defendants complain that the State was permitted to cross-examine one of the accused when on the stand as a witness, concerning matters not testified to by him in his examination in chief, and our

State vs. Wright et al.

attention is directed to *State vs. Underwood*, 44 An. 852, as conclusively establishing their right to relief. There is an essential difference between that case and this. In the former case the judge did not question the correctness of the recitals of the bill, while in this case he does so. In the case cited, we declare that "where there was a difference between the judge and counsel as to the circumstances connected with a bill of exception the statements of the former are to be taken as true." The argument urged by defendant on this subject demonstrates the importance of District Judges examining carefully the recitals of the accused set forth in his bills before assigning the special reasons which may have influenced them in their ruling and of their negating entirely or modifying the recitals when incorrect. It is claimed that in the absence of such action the situation is that of a defendant who, without pleading the general issue or making special denials, relies exclusively upon special defences, which leave the allegations of the petition uncontested and the case to be depended solely on the merits of the special defence.

The reasons assigned by the District Judge in some of the bills are by no means satisfactory, and leave us in doubt as to whether, while stating conclusions and opinions formed by him, he is not reasoning from entirely wrong premises. Testimony perfectly admissible when drawn, and if drawn from an ordinary witness, might be totally inadmissible when elicited from an accused and tested as to its admissibility by the rule that the cross-examination of an accused when on the stand as a witness should only extend to matters concerning which he had given his testimony. As we said in the *Underwood* case, the questions might well be asked as properly bearing upon the case, and "yet not be asked of this particular witness." It is of the utmost importance in the consideration of questions touching the scope of the examination of accused parties when on the stand as witnesses that we should be brought to a knowledge as to what was exactly testified to by them in chief and also as to what was sought to be elicited from them on cross-examination, and as to what was the result of that cross-examination if permitted. The prosecuting officer and the counsel of the accused should each make recitals of what the facts testified to were, and not deal in sweeping declarations on the one hand that the cross-examination was clearly within the limitations of the law, and on the other that it was not. The court, standing thoroughly impartial between the

State ex rel. Lumber Co. vs. Justice of the Peace.

State and the prisoner, should make its own recital of the testimony, and not send cases up to us resting for decision upon mere conclusions of its own on that subject. In one of the bills in the record the court states that "all the accused participated in the larceny, and their pleas that they were innocent agents of each other found no favor with the jury." The proposition before the court was simply that of the admissibility of the testimony as affecting the question to be submitted to the jury whether accused did or did not participate in the larceny. Whether or not they did so was the very matter at issue. The jury's subsequent conclusions could have no legal bearing in determining the legal correctness or incorrectness of the rulings of the court upon the testimony to be sent before them for the purpose of reaching those conclusions.

We do not think even if the questions had been answered, as accused would have us assume them to have been answered, they would have led up to serious injury or wrong, or affected the verdict.

For the reasons assigned, the judgment appealed from is affirmed.

No. 12,340.

THE STATE EX REL. BRAKENRIDGE LUMBER COMPANY VS. J. T. TULLY
JUSTICE OF THE PEACE FOR THE FOURTH WARD, LIVINGSTON
PARISH.

Under the Code of Practice the justice of the peace is not required to assign and try separately from the answer, the exception on which the defendant relies. Arts. 1032 *et seq.*, 1036.

This Court has no power, under the writ of *certiorari*, to review the judgment of the lower court sustaining the plea of domicile; the writ can not be substituted for an appeal. Constitution, Art. 90; C. P., Arts. 855 *et seq.*; 41 An. 180; 42 An. 1090; 43 An. 177.

ON APPLICATION for Writs of *Certiorari* and Prohibition.

Henry P. Dart and Benjamin W. Kernan for Relators.

Respondent in *propria persona*.

Submitted on briefs December 5, 1896.

Opinion handed down December 14, 1896.

48 1532
52 988
52 989
48 1532
117 297

Fisbel vs. Alexander, Executor, et al.

APPLICATION FOR WRITS OF CERTIORARI AND PROHIBITION.

The opinion of the court was delivered by

MILLER, J. The relator was sued before the fourth justice of the peace for the parish of Livingston, and pleaded his domicile in this parish. The plea was overruled, judgment was rendered against the defendant, and that judgment is sought to be reviewed here on the writ of *certiorari*.

It is claimed that the judgment for the amount claimed was rendered without previously fixing the plea of domicile and notifying the relator that the plea was overruled. Under the articles of the Code of Practice the defendant, cited to answer the demand, must make his defences, whether by exception or answer. The proceedings contemplated by the Code do not require the assignment for trial first the exceptions and then a trial on the merits. The record shows the court heard testimony on the merits and considered the exception. He decided against the defendant, and he was notified of the judgment. The proceedings show no irregularity, and our cognizance under the writ of *certiorari* is confined to the record and to a correction of proceedings. We find no such basis for the writ.

Again it is claimed substantially that the exception of domicile should have been sustained. But the court had the jurisdiction to determine that question. The *certiorari*, we have had frequent occasion to hold, is not the substitute for an appeal. Constitution, Art. 90; State *ex rel.* Block vs. Judge, 41 An. 180; State *ex rel.* Matranga vs. Judge, 42 An. 1090; State *ex rel.* Railroad Company vs. Riley, Justice, 43 An. 177.

It is therefore ordered, adjudged and decreed that our previous order herein be set aside, and that this application be denied at relator's cost.

No. 12,282.

MRS. J. C. FISHEL VS. MARY ALEXANDER, INDIVIDUALLY AND AS EXECUTRIX, ET AL.

Of a suit having for its object to reduce an excessive donation *mortis causa*, so that plaintiff may realize out of the fund obtained, a judgment for less than one hundred dollars he owns against one of the heirs of the testator, this court has no appellate jurisdiction. Such a suit is revocatory in character, and the amount sought to be realized from the *res*, or sought to be subjected thereto, governs the jurisdiction, and not the *legitime* of the heir.

Fishel vs. Alexander, Executrix, et al.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Ernest T. Florance, Charles Rosen and Dart & Kernan for Plaintiff,
Appellant.

Andrew J. Murphy for Defendants, Appellees.

Submitted on briefs November 30, 1896.

Opinion handed down December 14, 1896.

ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

WATKINS, J. The ground of the motion is that this court is without jurisdiction *ratione materiæ*, for the reason that the amount involved is below the lower constitutional limit of two thousand dollars.

This suit is brought by the plaintiff as assignee of a judgment which was rendered by the First City Court of New Orleans in favor of the plaintiff in the suit entitled Chapsky Bros. vs. John Alexander, for the capital sum of seventy-two dollars and seventy-five cents, with legal interest thereon from the 25th of October 1885 and costs; and he seeks to recover a judgment against Mary Alexander, executrix of Mrs. Jane Alexander, deceased, decreeing John Alexander, judgment debtor, to be a forced heir of the testator and entitled to recover one-fourth of the estate, aggregating ten thousand dollars.

The averment of his petition is that as Mary Alexander was constituted the sole legatee under the will, her legacy should be reduced in so far and to the extent that it deprives John Alexander of his *legitime*.

That said John Alexander has made no attempt and does not intend to make an attempt to have said legacy reduced, and that unless same is reduced he will be deprived of his inheritance and the plaintiff will be prevented from realizing the amount of her judgment.

Evidently the plaintiff would be entitled to take from the amount of John Alexander's *legitime* only the amount of the judgment Chapsky Bros. assigned to her, and that is less than one hundred dollars.

Gelpi & Bro. vs. Treasurer.

True it is that she alleges that the interest of her debtor, John Alexander, is about two thousand five hundred dollars in the estate of his mother, Mary Alexander, deceased, but she does not sue in the capacity of an heir or creditor of the estate of Mrs. Jane Alexander, and does not allege an interest therein. There is no *concursus* formed in which she alleges an interest, and there is no fund for distribution.

This is in the nature of a revocatory action in which the amount of money sought to be realized from the *res* in court, or sought to be subjected thereto, governs the jurisdiction and not the thing itself. *Loeb & Blum vs. Arent*, 38 An. 1085; *State ex rel. Zuberbie* & *Behan vs. Judge*, 34 An. 1215; *Mullen vs. Zuberbie & Behan*, 39 An. 888.

Manifestly this court has no jurisdiction.

Appeal dismissed.

No. 12,255.

PAUL GELPI & BRO. vs. C. H. SCHENCK, TREASURER.

The proof is that the plaintiffs are importers; that they sold the goods in the original packages, but had not collected the proceeds of the sale. The defendants sought to collect a municipal tax upon these goods.

Sales by the importer are held to be exempt from State taxation. The importer by paying duty acquires a right to dispose of the merchandise, as well as to bring it into the country. The tax claimed would have the effect of intercepting the import *in transitu*, to become incorporated with the general mass of the property, and would prevent it from becoming so incorporated until it should have contributed to the revenue of the State.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Harry H. Hall for Plaintiffs, Appellees.

Samuel L. Gilmore, City Attorney, and *W. B. Sommerville*, Assistant City Attorney, for Defendant, Appellant.

Argued and submitted November 19, 1896.

Opinion handed down December 14, 1896.

Gelpi & Bro. vs. Treasurer.

The opinion of the court was delivered by

BREAUX, J. The plaintiffs were assessed for taxes in the year 1894, as follows: "Money loaned on interest, all credits and all bills receivable for money loaned or advanced or for goods sold, twelve thousand dollars."

The tax claimed is designed for municipal purposes, and has no reference to any inspection law.

They have brought this suit claiming exemption from taxation on the property above mentioned.

They allege that in 1893 they conducted a wholesale business as importers of foreign goods in this city; that there was that year levied against their imported goods, in unbroken original packages, an assessment of fourteen thousand dollars; that in the case of *State ex rel. Gelpi & Bro. vs. Board of Assessors*, 46 An. 145, it was decided that their imported goods in such packages were not liable to taxation by the city of New Orleans; that notwithstanding the decision of this court, an assessment for 1894 has been levied against them upon credits and bills receivable for goods sold; that their only credits and bills receivable are for sale of foreign imports in unbroken original packages, upon which they have paid duty to the United States Government, and that to assess them is illegal and unconstitutional, as no such tax can be levied by a State or municipal corporation upon sales of imported goods in unbroken original packages.

The plaintiff prayed for and obtained an injunction prohibiting the defendant from seizing their property for the tax in question.

The answer was, in substance, a general denial.

The following was the agreed statement upon which the cause was tried:

"It is admitted that Paul Gelpi & Bro., plaintiffs herein, had in their business credits and bills receivable for goods sold for the year 1894, amounting to twelve thousand dollars; that said bills were for imported goods, upon which they had paid an import duty to the United States Government, and that said goods were sold by them in original unbroken packages, said bills representing simply and solely the unpaid prices never reduced by them to possession of such imported goods."

The foregoing is the case in so far as relates to the facts.

From a judgment in favor of plaintiffs, and against the city treas-

Gelpi & Bro. vs. Treasurer.

urer enjoining him from collecting the tax claimed, the latter prosecutes this appeal.

The question involved in this case is whether a State can constitutionally impose a tax upon the price of unbroken packages, not collected; under an assessment for "goods sold;" these words from the assessment are the only words which have any application to the present case.

The other portions of the assessment, as made, applies to "money loaned," which is not a question here.

The power of the State is subject to well defined limitations.

Within these limitations, the States are prohibited from creating the power of taxation in a way contravening with the revenue laws of the general government.

The rule is that the State shall not so tax imports as to impede foreign commerce.

Property bears the burden of taxation. Its value is affected to an amount equal to the tax. An increased price of foreign merchandise may result from the tax. If the importer owes this tax, he will, in accordance with business rule, add the amount to the cost of the goods. In so far as this is an impediment to foreign commerce, it would be in contravention with the article of the Constitution upon the subject. It is true that the impediment to commerce is thereby quite limited. It nevertheless is an impediment. The purpose of the provision of the Constitution invoked by the plaintiff in this case has received the attention of the Supreme Court of the United States in a number of cases.

Notably a well considered case upon the subject was the case of *Cook vs. Pennsylvania*, 97 U. S. 566, 575, reviewing a number of decisions upon the subject here at issue.

The contention was between the State of Pennsylvania and an auctioneer, who sold imported goods, in original packages, at auction, for importers. The law of the State required him to pay as the amount of a license, into the treasury of the commonwealth, a tax of one-quarter of one per cent. The effect of this was, the court held, a discrimination to that amount against foreign goods sold at auction; and further, that it contravened with the clauses of the Constitution which give to Congress power to regulate commerce with foreign nations and forbids a State, without the consent of Congress, to levy imports or duties on imports.

State ex rel. Watkins vs. Justice of the Peace.

"Sales by the importer are held to be exempt from State taxation because the importer purchases by the payment of the duty a right to dispose of the merchandise as well as to bring it into the country." *Waring vs. The Mayor*, 8 Wallace, 110, 123; *Desty*, and also *Cooley on Taxation*, have copied the words of these decisions as part of their texts.

From Hare's American Constitutional Law, p. 252, we extract:

"A State tax can not be levied on goods that have been brought from abroad, nor can the importer be made to purchase a license before effecting a sale, because such a requirement is virtually a tax and would, moreover, operate as a regulation on commerce."

The present is a stronger case than those to which we have referred, and more clearly contravenes the articles here invoked.

The price of the property it was sought to tax was not in the possession of the importer. The importer having the right to sell (without taxation for municipal purposes) the imported goods in original packages, it follows that he has the right to collect the price without having to pay the taxes claimed.

It not being cash in the possession and enjoyment of the importer, but the price not collected representing the property sold, we are confident that it is not subjected to taxation.

The judgment of the court *a qua* is therefore affirmed.

No. 12,387.

STATE OF LOUISIANA EX REL. L. K. WATKINS VS. JAMES W. BATEN,
JUSTICE OF THE PEACE.

The judge has no authority to supply the plea of prescription, which must be specially pleaded by the defendant.

The case of *Abraham Stein vs. Lazarus Brunner*, 42 An. 772, affirmed.

ON APPLICATION for Writs of *Certiorari* and *Mandamus*.

Relator *in propria persona*.

Respondent *in propria persona*.

Submitted on briefs November 30, 1896.

Opinion handed down December 14, 1896.

The opinion of the court was delivered by

MCENERY, J. The relator applies for a *mandamus*, under the supervisory jurisdiction of this court, to compel the respondent judge to proceed with a suit filed by him, and to enter up judgment in the case.

In the suit of relator against one Gifford Sampson, filed in the respondent's court, the magistrate dismissed the case because of want of jurisdiction. This order of dismissal was on the motion of the magistrate who took notice of the fact that the obligation sued on was more than five years' standing, and in his opinion the obligation was prescribed, and as there was nothing due he could not entertain the suit. In his return he alleges that he bases his action upon an opinion and decree recently rendered by the Circuit Court of Appeals in this circuit. We are inclined to believe that the respondent judge is in error in interpreting some decree of that court.

Prescription can not be supplied by the judge. It must be specially pleaded by the defendant. In this case the obligation sued on was for the sum of ten dollars. When it was executed the defendant waived citation and confessed judgment for the amount. The waiving of citation was a personal privilege, which he could do in advance, and he could confess judgment at the same time. The hardship, if any, is of his own making. *Stein vs. Brunner*, 42 An. 72.

The duty of the judge was very plain. In the absence of any appearance of the defendant, or any plea filed by him, to enter judgment against the defendant. *Id.*

The relief prayed for is granted, and the *mandamus* made peremptory.

No. 12,290.

THE STATE VS. HARRY PORTER.

An indictment for rape is defective that does not charge the felonious intent accompanying the act: The qualification merely of the assault as felonious will not suffice. 2 Archinard's Criminal Law, pp. 307, 312; 42 An. 52; 6 An. 328; 33 An. 1288.

The conviction for the lesser offence is not supported by an indictment which neither charges the greater offence, nor embraces the constituents of that of inferior grades. R. S., Sec. 1053; 29 An. 601; 33 An. 387; 20 An. 145.

A PPEAL from the Ninth Judicial District Court for the Parish of De Soto. *Hall, J.*

48	1539
125	310

State vs. Porter.

M. J. Cunningham, Attorney General, and *J. B. Lee*, District Attorney, for Plaintiff, Appellee.

Elam & Egan for Defendant, Appellant.

Submitted on briefs November 21, 1896.

Opinion handed down December 14, 1896.

The opinion of the court was delivered by

MILLER, J. The defendant appeals from a sentence for assault to commit rape; the indictment being for rape.

He relies for the reversal of this sentence upon the motion to quash the indictment and the bill of exceptions to the overruling the motion. The indictment charges that the accused in and on one I. B. violently and feloniously did make an assault, and her the said I. B. then and there forcibly and against her will did ravish and carnally know. The ground of the motion is the indictment sets forth no offence, the felonious intent essential to constitute the crime of rape not being charged. The assault is charged to have been felonious. The State claims that "feloniously" is to be taken also to qualify ravish and carnally know.

Indictments for common law offences must set forth the constituents of the crime; it is not sufficient to follow merely the words of the statute using the common law term of the offence. *State vs. Read*, 6 An. 228; *State vs. Cook*, 20 An. 145; *State vs. Flint*, 33 An. 1288. Nor can there be any question that the felonious intent to ravish and carnally know is essential to the crime of rape. The crime is of the highest order of felonies, and feloniously qualifying "ravish" it is laid down must be charged in all indictments for such crimes. 2 Archibold Crim. Practice and Pleadings, 304, 307, 312; 2 Bishop Crim. Proc. 807, 808. In this indictment "feloniously" is used in qualifying the assault, but is not used in qualifying the sentence, ravish, etc. By no rule of construction can we extend the function of this important adverb and make it qualify any act but the assault in connection with which only it is employed. If this construction required any additional support it will be supplied by the precedents for indict-

State vs. Porter.

ments found in all the books of forms, and exacted by all the authorities. The indictments invariably use the adverb twice, *i. e.*, qualifying the assault, and again in qualifying the following acts the substantial elements of the crime, thus: the said A. B. did feloniously assault C. D., and her, the said C. D., did then and there feloniously ravish and carnally know. Archibold *Ibid.*; 2 Wharton's Precedents, p. 186. We have been referred by the State to authorities from other States to support the indictment. We think we must follow our own decisions, as the decisions in other States may be controlled by their legislation. The authorities (State vs. Bradford, 33 An. 921; State vs. Sonnier, 38 An. 962; Carroll vs. Succession of Carroll, 48 An. 963; State vs. Langford, 45 An. 1178; Manning's Unreported Cases, p. 394) we do not think sustain defendant's contention. Our conclusion is the indictment is defective.

The State insists that the indictment, if not sufficient for rape, will sustain the conviction for assault with intent to commit rape. Revised Statutes, 1053; State vs. May, 42 An. 82. The rule applies when the indictment, charging with sufficiency one offence, includes another. Here no offence is charged and none is included. The cases cited by the State on this branch of the argument hold: one that it is enough, in an indictment for assault to commit rape, to charge the act itself as done feloniously; the other, that an indictment good for murder would sustain a conviction for manslaughter. The case in 42 An. was an indictment for rape, to which there seems to have been no objection. State vs. Langford, 45 An. 1178; State vs. Lee, 46 An. 623. The difficulty here is the indictment will not avail for the offence charged, nor include that of lower grade, and hence will not sustain the conviction for the assault. Archibold, 2d Vol., 7th Ed., p. 69, Note 1; State vs. Thomas, 29 An. 601; State vs. Green, 36 An. 99; State vs. Scott, 38 An. 387.

We think under our system, excluding the judge from charging on the facts, that the instructions asked in this case, in effect instructing the jury as to the inference of consent on the part of the woman, the jury should draw from the hypothesis of fact stated in the bill, was properly refused. We notice the point in view of the new trial that must occur.

It is therefore ordered, adjudged and decreed that the sentence of the lower court be avoided and set aside, and the prisoner held for another trial on the indictment that may be preferred for the offence.

State ex rel. Wilkinson vs. Judge.

No. 12,202.

STATE EX REL. JAMES WILKINSON VS. ROBERT HINGLE, JUDGE.

The District Judge has the right, at any time, to appoint jury commissioners and the exercise of this right will not be interfered with. When a judge succeeds, another who during his incumbency of the office ordered a special jury terms the new judge can set aside the order.

APPPLICATION for Writs of *Mandamus* and Prohibition.

Relator *in propria persona*.

E. Howard McCaleb and John Dymond, Jr., for Respondent.

Submitted on briefs June 13, 1896.

Opinion handed down June 29, 1896.

The opinion of the court was delivered by

MCENERY, J. The predecessor of respondent set aside and annulled the appointment of a jury commission and then appointed another, and subsequently ordered a special jury term, without reference to the trial of any particular case.

The respondent judge, on qualifying, set aside the order of his predecessor, and appointed another jury commission, and set aside the order for a special jury term.

These orders he had an undoubted right to make, and we can not annul them. It does not appear that the orders were issued with special reference to the trial of the case of Wilkinson vs. Hingle who is the respondent in this case, and who is recused. The judge selected to try the case has full power to issue all necessary orders. If on the trial of the case of Wilkinson vs. Hingle it appears that the jury commission appointed by the respondent judge acts with partiality and illegally, it will be time enough to notice the irregularities in the trial. It is certain that we can not in advance take notice of the alleged intended partiality of the jury commission appointed by the respondent judge.

It was a power vested in him when he ascended the bench to appoint the jury commission, and to set aside the order for a special jury term, if, in his judgment, it was necessary and essential for the public interests.

The relief prayed for is denied.

Board of Trustees vs. Campbell.

No. 12,205.

BOARD OF TRUSTEES OF THE SEVENTH STREET COLORED M. E.
CHURCH VS. WILLIAM CAMPBELL.

Under Sec. 677, R. S., which requires that the incorporators "shall prepare and sign" an act, either in an authentic or private form, it is not essential that the incorporators should each and all be able to sign their names. 9 La. 521; 11 La. 251; 15 La. 48; 5 An. 685.

Where, in an act, a vendor declares that he sells the property with full warranty without a word of reservation, exception or limitation, a clause at the very close of the act which declares "In trust that said premises shall be used and kept, maintained, and disposed of as a place of divine worship, for the use of the ministry and membership of the Colored Episcopal Church in America, subject to the discipline, usage and ministerial appointments of said church, or from time to time authorized and declared by the general conference of said church, and the annual conference within whose bounds the said premises are situated," is no part of the contract between the vendor and his vendee; it is an enunciation foreign to the disposal of the property, in which vendor who had parted absolutely with his entire interest had no concern. It is merely a clause declaratory of the object for which the purchase was made.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Rogers & Dodds for Plaintiffs, Appellees.

J. McConnell & Son for Defendant, Appellant.

Argued and submitted November 16, 1896.

Opinion handed down December 14, 1896.

STATEMENT OF THE CASE.

Plaintiffs gave to W. P. Curtis, an auctioneer, a written authorization to sell their church property on Prytania near Conery street for the sum of forty-five hundred dollars. The defendant, Campbell, agreed to purchase the property at the price stated, and to bind the agreement made the usual deposit of ten per cent. of the price with the auctioneer. On examination by his counsel the title was rejected as defective. (1) Because it was held by plaintiffs in trust, and really for use only; (2) because the charter of the plaintiff corporation was irregular and illegal in form. Afterward the parties entered into an agreement, expressed in the following:

48 1543
52 1225
48 1548
105 717
48 1548
111 456
48 1543
114 678

Board of Trustees vs. Campbell.

" *Mr. W. P. Curtis:*

" You are authorized to return to Captain Campbell the amount of four hundred and fifty dollars deposited by him to secure sale mentioned herein.

" (Signed)

CHARLES T. HENDREN,

" *Chairman Trustees.*"

At the time of the signing and delivery of the foregoing instrument to the auctioneer the defendant signed and executed the following:

" NEW ORLEANS, January 5, 1895.

" I hereby agree and bind myself to take the property known as the Mt. Calvary C. M. E. Church property corner of Prytania and Oonery streets, in this city, and pay therefor, the sum of forty-five hundred dollars *cash*.

" This agreement holds good only in case the said church makes me a good title to same within thirty days from this date.

" In case I pay only one-third in cash the deferred payments are to bear interest at the rate of seven per cent. per annum. Should this transaction fail by fault of the vendors I am to have interest on my deposit of four hundred dollars at seven per cent. per annum for forty-five days' time, same was held by Wm. P. Curtis.

" (Signed)

WM. CAMPBELL."

Plaintiff brings this suit to compel the defendant to accept title.

There was judgment for plaintiff and defendant appeals.

The opinion of the court was delivered by

NICHOLLS, C. J. In the examination of plaintiffs' act of incorporation* we confine our attention to the specific objections to the

*ACT OF INCORPORATION OF THE PLAINTIFF CORPORATION.

" We, the undersigned members of the Colored Methodist Episcopal Church in America, residing in the city of New Orleans and State of Louisiana, have agreed and consented together to constitute and organize ourselves into an incorporation under the laws of the State of Louisiana, providing for the organization of corporations for literary, scientific, charitable and religious purposes, under the following rules and articles.

ARTICLE FIRST.

This corporation shall be known by the name and style of Trustees of the Seventh Street Church of the Colored Methodist Episcopal Church in America, and as such shall be capable of suing and being sued. It shall be domiciled in the city of New Orleans, where its president shall reside, upon whom all legal process shall be served.

ARTICLE SECOND.

The object of this association shall be to receive title to and hold, care for, and preserve the buildings and property of the Seventh Street Colored Methodist

Board of Trustees vs. Campbell.

same urged by the defendant. Sec. 677 of the Revised Statutes declares that the incorporators of a corporation organized under its authority "shall prepare and sign" an instrument either in an authentic form or private signature containing certain specified declarations, among which is not included a requirement that the names of the incorporators should be mentioned in the body of the act. They are required to "prepare and sign" an act which, after being so prepared and signed, approved by the District Attorney,

Episcopal Church in America, for the use of said church in the worship of Almighty God, together with such other properties as may be considered right and proper for the use of said church, or for a parsonage therefor.

ARTICLE THIRD.

All the members of this corporation shall be members of the Colored Methodist Episcopal Church in America, and shall have attained the age of twenty-one years. The trustees shall elect from time to time, from their own members, a president, a secretary and a treasurer.

All vacancies occurring in this corporation, by death, resignation or otherwise, shall be filled by the remaining members of the corporation by election and vote of a majority of the members present at any regular meeting; or the same may be filled in accordance with the provisions of the discipline of the Colored Methodist Episcopal Church in America.

ARTICLE FOURTH.

The president, or any two members of this corporation, shall be empowered to call a meeting of the same by giving a reasonable notice, and a majority of the members shall constitute a quorum for the transaction of business.

ARTICLE FIFTH.

This corporation, as a board of trustees, shall be governed by the discipline and rules of the Colored Methodist Episcopal Church in America, enacted for the government of trustees of churches, so far as the same is not contrary to or inconsistent with the articles of this incorporation, the laws of the State or the laws of the United States.

ARTICLE SIXTH.

This corporation shall continue to exist for the term and space of ninety-nine years from the date hereof, unless sooner dissolved by the consent of the members hereof.

(Signed)	IMMER BALL, Witness.	(Signed)	JAMES ^{his} SOUTHERN. mark.
"	W. H. FOSTER, "	"	ARCHIE ^{his} BALDWIN. mark.
"	W. H. FOSTER, "	"	PHILIP ^{his} JINKS. mark.
"	W. H. FOSTER, "	"	SAMUEL ^{his} RUSSELL. mark.
"	W. H. FOSTER, "	"	EMANUEL ^{his} HALL. mark.
"	W. H. FOSTER, "	"	JOHN JONES.
"	W. H. FOSTER, "	"	J. C. OLIVIER, JR.

"I, the undersigned District Attorney of the parish of Orleans and city of New Orleans, State of Louisiana, do hereby certify that I have examined the foregoing form of charter, and find the articles thereof in all particulars according to law, and hereby approve the same and admit it to registry, whereby it will become a legal act of incorporation and charter of the trustees of the Seventh Street Church of the Colored Methodist Episcopal Church in America.

"New Orleans, April 3, 1894.

"(Signed)

JOHN J. FINNEY."

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and registered by the recorder, constitutes the "subscribers" to the same a body corporate. It is not essential that the incorporators should each and all be able to write their names.

"In the primary sense of the word, a person 'signs' a document when he writes or marks something on it in token of his intention to be bound by its contents. In the case of an ordinary person signature is commonly performed by subscribing his name to the document, and hence signature is frequently used as equivalent to 'subscription,' but any mark is sufficient if it shows an intention to be bound by the document. Illiterate persons commonly sign by making a cross." (Sweet's Dict. Knox's Estate, 131 Pa. St. 230.)

"A signature consists both of the act of writing a party's name and of the intention of thereby finally authenticating the instrument. It is not necessary that a testator should write his entire name. His mark is now held sufficient. And if the signature is made by another guiding his hand with his consent, it is held sufficient." 2 Greenleaf Evidence, 674, followed in Watson vs. Pipes, 22 Miss. 466; Vines vs. Clingfoot, 21 Ark. 312; see also 'Wills.'

"All the definitions include a mark, and no dictionary limits a signature to a written name." Zacharie vs. Franklin, 12 Peters (U. S.), 161; Shank vs. Butsh, 28 Ind. 19; Bickley vs. Keenan, 60 Ala. 295; (See the American and English Encyclopedia of Law, Vol. 22, *verbo* "Signature," and the same work, *verbo* "Mark," Vol. 14, p. 457.)

Our decisions have recognized the ordinary mark of a person as being his signature in a number of cases; proof of the same having been made. See Tagiasco vs. Molinari's Heirs, 9 La. 521; Madison vs. Zabriskie, 11 La. 251; Lopez vs. Berghel, 15 La. 43; Chaffe vs. Cupp, 5 An. 685.

It is not claimed that the marks subscribed to the act of incorporation are not those of the persons named. The act was submitted to the District Attorney, was approved by him and ordered to be registered. It is to be presumed that there was proper proof made to him of the signatures before he took such action. We think the act very clearly shows who are to have the direction of the affairs of the company. The third article provides for a president, a secretary and a treasurer, to be elected from time to time by the trustees. The fourth article provides for meetings of the Board of Trustees from time to time "for the transaction of business." A

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majority of the board is declared to constitute a quorum for that purpose, and such meetings are authorized to be called by the president, or any two members of the corporation.

The duties of the president, secretary and treasurer are not specifically set out, but such officers, in all organizations and corporations, have well recognized general duties, which could be made specific by by-laws, subsequently to be adopted by the Board of Trustees, who, obviously, were to have the general control of the affairs of the corporation. The terms of office of the president, secretary and treasurer were not fixed by the act. That matter was left open also to be provided for by by-laws. The Board of Trustees was a continuing body. In the event of vacancy, their number was to be kept filled from among members of the colored Methodist Episcopal Church in America, by election and vote of a majority of the remaining members of the board. The president was specially designated as the person upon whom all process should be served.

We fail to see wherein the act of incorporation is defective. The party with whom defendant dealt was unquestionably a corporation.

That preliminary question having been disposed of, we next direct our attention to the claim made by defendant that although he entered into a contract of sale with the plaintiff corporation, that contract was set aside.

He says that plaintiff acknowledged that the title which it held at the time of the first contract was not a valid one, and it consented to a rescission of the contract of sale, and to the return of the deposit of money which he had made "to bind the sale." That thereafter, he, himself, tendered to the plaintiff a new distinct proposition that he would purchase the property, provided it made to him a good title within thirty days from the date of the offer. He says that that offer has never been accepted; that plaintiff has taken no steps to acquire a new title, and has tendered to him the identical title which it had acknowledged to be bad. We do not think there was any abandonment or rescission of the contract of sale—there was simply a consent of both parties that the deposit should be returned to defendant to await, during thirty days, the final result as to the validity of the title offered. If, at the end of the time fixed, the title which plaintiff tendered was not a good one defendant was to have interest on his deposit during the forty-five days it was held by W. P. Curtis. There was a postponement for the

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purpose evidently of meeting some objection which had been urged to the title, but no waiver of rights on either side. What the precise objections were we do not know. Plaintiff took certain steps during the delays fixed in reference to the disposal of the property by it, which do not seem to have been previously taken. It obtained the approval of the quarterly conference of the Colored Methodist Episcopal Church to the proposed sale and its consent thereto, and the approval and consent thereto of the local preacher in charge of the church, and tendered title to defendant within the delay fixed. This tender was an acceptance of defendant's proposition, if any new acceptance were needed, as defendant claims. Whether the title tendered was a good and valid title is the only question we have to decide.

Defendant claims that the title is defective; that it is not absolute, and in fee simple, but held "in trust" in violation of the laws of the State. If, by this, defendant means that the title which the plaintiff received from Calvary Church was one not complete and absolute, he is clearly mistaken. The act declares that the vendor sells the property with full legal warranty to the plaintiff corporation, to have and to hold the same unto the said purchaser, his heirs and assigns forever. There is not a word of reservation, exception or limitation on the part of Calvary Church. It parted with its entire title, conveying it to the plaintiff corporation. The clause at the very close of the act, which reads: "In trust that said premises shall be used and kept, maintained and disposed of as a place of divine worship for the use of the ministry and membership of the Colored Episcopal Church in America, subject to the discipline, usage and ministerial appointments of said church as from time to time authorized and declared by the general conference of said church and the annual conference of said church, and the annual conference within whose bounds the said premises are situated," is no part of the contract between plaintiff and Calvary Church. It is an enunciation foreign to the disposition of the property between the parties, and merely the announcement of an intention of the corporation to connect itself with a superior religious body. Calvary Church had obviously no interest in that matter. The clause in question was simply one declaratory on the part of the purchasers of the object and purpose for which the purchaser made the purchase. It was, as we have said, an enunciation foreign to the disposition of the

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property, as between the vendor and vendee—a mere “admission” evidencing no “contract,” or “part of a contract” between them (33 Pac. 838-839)—and no “contract” between the plaintiff corporation and the Colored Methodist Episcopal Church of America. C. C. 1814.

The title which the plaintiff received from its vendor being a good one, we are next to inquire what objections can be urged by the defendant to any title which plaintiff itself would convey. Defendant in general terms says that the property is held in trust and the title is bad, but he does not inform us who the party is for whom it is held and what particular danger is to be apprehended from its passing by sale out of the plaintiff to the defendant. The property has certainly not passed out of commerce, and so situated as to forcedly remain hereafter forever in plaintiff's ownership and possession. Defendant himself says that such a condition of things would be violative of the policy of the law. There must be, therefore, some present method by which the property can be disposed of. We know of no one but the plaintiff who could dispose of it. It holds the legal title, and if there be any person or persons having any vested interest in it, they have not been made to appear. It may be that the plaintiff corporation as a condition of placing itself subsequently in religious connection with a religious body known as the Colored Methodist Episcopal Church of America has been made to consent and has consented to deal with the property according to the rules and regulations of that body, and that in so doing they have consented to subordinate, for certain purposes, their powers to the control or supervision of a superior body, but if they have done so the only interest which defendant has in that matter is that the Board of Trustees should have exercised their powers in the manner and form and under the conditions it had agreed to. If it has done so and the controlling, superior body approves and consents to the transfer defendant can have nothing to apprehend. The property will have been freed from further control and will pass unfettered and free into defendant's ownership. Defendant has not pointed out to us anything which would tend to show that the property has been sold in strict accordance with the rules, regulations and discipline of the Colored Methodist Episcopal Church. The course pursued by the plaintiffs seems to have been in conformity to the same.

For the reasons herein assigned it is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed.

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No. 12,188.

 NEW ORLEANS CITY & LAKE RAILROAD COMPANY VS. DR. W. H.
WATKINS.

The General Assembly did not intend to use the words "street railroad," in Act 135 of 1888, in any narrow or technical sense; its evident purpose was to compel the city of New Orleans to make available for city purposes, and for the public benefit, in money, any local railroad franchise or privilege which was valuable, and the amount to be derived from the granting of which was likely to be increased by being put up at public auction.

In *East Louisiana Railroad vs. City of New Orleans*, 46 An. 526, this court held that the Act 135 of 1888 did not apply to railroads carrying the mails and transporting freight and passengers long distances beyond the limits of the city; and, besides, the *East Louisiana Railroad Company* was an existing corporation, having its domicile out of the city of New Orleans, with its legal character and its franchises as a railroad already fixed. The ordinance of the city granted a simple "right of way." It originated in favor of the company no new source of revenue, no change in its business, nor effected and authorized no additional traffic arrangements.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

Denégre, Blair & Denégre and Farrar, Jonas & Kruttschnitt for
Plaintiff, Appellee.

Branch K. Miller and Percy Roberts for Defendants, Appellants.

Argued and submitted June 8, 1896.

Opinion handed down June 22, 1896.

Rehearing refused December 14, 1896.

STATEMENT OF THE CASE.

On the 5th of March, 1895, the Common Council of the city of New Orleans adopted Ordinance No. 10,392, Council Series, by which "it granted to W. H. Watkins and his associates, successors or assigns, the right to construct, maintain and operate a single or double track railroad upon the routes and lines therein described and to use steam locomotives or other appropriate motive power; Provided, that within sixty days from the promulgation of the ordinance the said W. H. Watkins and his associates would, under penalty of the nullity of the grant by the mere lapse of time, cause the same to be transferred to a corporation organized under the

 48 1550
49 681

 48 1550
52 1070

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laws of this State with its domicile in the city of New Orleans, which corporation should provide in its charter for the assumption of the grant on such terms as may be agreed between it and the said W. H. Watkins and his associates.

The route designated by the ordinance was the following: "Beginning on Hagen avenue and Calliope street, connecting with the tracks of the Illinois Central Railroad Company; thence on Hagan avenue, connecting with the switch track of the Southern Chemical and Fertilizing Company, Limited; thence upon and along the extension of Hagan avenue and Hagan avenue to a point near Bienville street; thence along by the shortest practicable route to the intersection of Hospital or Barracks street and Metairie road; thence along Hospital street or Barracks to a point on or near Taylor avenue; thence to Bayou St. John, crossing Bayou St. John on an iron drawbridge with a clear opening of fifty feet on to the embankment of Marigny Canal or Pleasure street or avenue, and along said embankment or avenue to Marigny avenue; thence along and upon Marigny avenue to Elysian Fields street, with the right to there connect with the switch tracks of the Standard Guano and Chemical Manufacturing Company, and to cross and connect with the tracks of the Pontchartrain Railway and the Louisville & Nashville Railroad on Elysian Fields street; thence along Florida Walk to People's avenue, with the right to there connect and cross the tracks of the New Orleans & Northeastern Railway to Montegut street; thence down Montegut street to St. Claude avenue, and there to connect with the New Orleans & Southern Railroad, with the right to cross all intervening streets to the lower limits of the city, and with the right to make suitable connections with the slaughterhouses of the People's Slaughterhouse Company and the Crescent City Slaughterhouse Company by spur tracks now existing, or such others as may be necessary."

The right was further granted to cross all intervening railroads, street railroads, canals, streets, alleys and other unimproved city property along the entire route above described, with the right to make such local variations from the above described route as might be necessary in order to locate and construct proper and suitable curves connecting with the various roads and parts of roads above described, and with the right to cross or extend along streets, alleys, canals and unimproved city property, with the right to construct such

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turnouts and switches as might be necessary to make a connection with all the railroads therein described and with the industries which are now, or may hereafter, be located along said route. The City Engineer should, upon request of the aforesaid grantee, furnish or approve the lines and levels upon which said railroads, tracks, or any part thereof are to be constructed upon such lines and levels as furnished or approved; provided, this grant should not interfere with grants made heretofore by the State of Louisiana, or the city of New Orleans, to other railroads, but should be subject thereto.

On the 30th of April, 1895, M. J. Hart, E. Greenbaum, Charles Mendelson, T. A. Clayton and Samuel J. Hart, the latter appearing individually and as acting for Sturgis S. Adams and R. T. McDonald, appeared before Hunter C. Leake, notary public, in the city of New Orleans, and proceeded to form a corporation known as the "Watkins Railroad Company." The declared object of the corporation was for the construction, maintenance, owning and operating by steam or other appropriate motive power, of a belt railroad, in the parish of Orleans, with connections and extensions into and in the parishes of Jefferson and St. Bernard, together with the necessary and proper locomotives, cars, railway tracks, warehouses, depots, yards, wharves, docks, switches, sidings, turnouts, turntables, inclines, transfer boats, elevators, bridges and terminal approaches thereto, and for the purpose of transporting for hire freight cars, passenger cars, loaded and empty, and merchandise, live stock and freight of every kind, to and from the several railroads, steamboat and steamship landings, depots, manufactories, breweries, wharves, docks, warehouses, slaughterhouses and other manufacturing industries and commercial establishments in the parishes of Orleans, Jefferson and St. Bernard along the line or adjacent to the line of said railroad, and for the purpose of acquiring the right and franchise granted by the city of New Orleans to W. H. Watkins and associates, successors and assigns, by Ordinance No. 10,362, Council Series, adopted by the city of New Orleans on the fifth day of March, 1895, and for the purpose of constructing, maintaining and operating the belt railroad provided for in said ordinance, along the route and upon the streets, ways, alleys and places in said ordinance mentioned and described, upon the conditions and within the limitations and provisions in said ordinance expressed, and for the purpose of acquiring any other or further or additional grant or fran-

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chise from the State of Louisiana, city of New Orleans, or the parishes of St. Bernard or Jefferson, that might be necessary to effectuate and carry out the purposes of this charter, and also to lease or acquire by original grant, or by purchase from grantees, other rights and franchises to construct, maintain and operate another line or other lines of belt railroad within the limits of the parishes of Orleans, Jefferson and St. Bernard, with the power to make any lease of its property and franchises, or any traffic arrangements, or to consolidate with other corporations operating lines of railway into and out of said parish, or with the corporate powers, rights, franchises and privileges specified in the act of incorporation. The act declared that the corporation was to have and enjoy corporate succession by its corporate name for ninety-nine years. The capital stock of the corporation was declared to be one hundred thousand dollars, divided into one thousand shares of one hundred dollars each, payable at the time of subscription in cash, or in franchises, or property, real and personal, conveyed to the corporation. The corporation was declared to be authorized to commence business whenever ten per cent. of the capital stock should have been subscribed and paid in.

On April 29, 1895, by act before Wenck, notary, in the city of New Orleans, W. H. Watkins transferred to the Watkins Railroad Company, represented by A. T. Moss, its vice president, all his title, interest of every kind and nature in and to the right and franchise to him granted under the said Ordinance No. 10,392.

On the 3d of November, 1895, Watkins executed his bond in favor of the mayor of the city of New Orleans for the sum of twenty-five thousand dollars under the requirements of Ordinance No. 10,392. The bond was approved by the mayor on the 5th of the same month, and on the 10th of December the Council approved of the mayor's action in so doing.

Plaintiff alleged that it is a corporation organized for the purpose of building, maintaining and operating street railroads in the city of New Orleans, and had been so engaged for many years since the time of its organization; that in such capacity it owned and controlled various lines of street railroads and a line of steam railroad; that among the lines of street railroad so owned and operated was a double track electric street railroad on the neutral ground of Canal street, from the intersection of Carondelet street and Canal street

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to the Metairie cemetery and return, and a double track horse railroad on the Metairie road running from the cemetery to Bayou St. John; that the line of steam railroad ran from West End, on Lake Pontchartrain, to the Metairie cemetery, and from Metairie cemetery to the intersection of Canal and Carondelet streets over the same rails on which it operated its electric street railroad. That the line of street electric road on Canal street was the principal thoroughfare to the cemeteries in the city of New Orleans, to which large numbers of people resorted, especially on Sundays and holidays, and was used by thousands of people every day. That the said line of steam railroad connected the city of New Orleans with West End, the principal pleasure resort in summer time of the people of the city, and from the 1st of May to the 1st of September petitioner carried thousands of people from the city through the said Canal street to West End and return. That on said electric street line they ran an average of a car from each *terminus* as often as every minute, each of said cars having a capacity to carry about forty people. That in summer time, from 1st of May to the 1st day of September, petitioner ran a steam train at intervals of fifteen minutes from each *terminus*, each train having a capacity to about six hundred people. That the line of double track railroad running from Metairie cemetery to the Bayou St. John would soon be converted into an electric line, and that said road was the only avenue from the old City Park to the lines of street railroad owned and operated by your petitioner on the other side of the Bayou St. John, thereby making connection for the people of the Third District with the Metairie cemeteries and with the old City Park, said line being much frequented by visitors to the cemeteries and park.

That for the franchises owned and operated by petitioner in the city of New Orleans (all of which was bought and paid for after competition at public auction to itself as the then highest bidder), petitioner had paid very large sums of money to the city of New Orleans, exceeding one million of dollars, and that petitioner, on said franchises and the property which it owned in the city of New Orleans, paid to said city annually taxes in excess of the sum of fifteen thousand dollars per annum. Petitioner averred that the City Council of the city of New Orleans did by Ordinance No. 10,382, Council Series, which said ordinance was adopted by said Council on the 5th day of March,

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1895, and was approved by the Mayor on the 7th March, 1895, grant to W. H. Watkins and his associates, successors or assigns, the right to construct, maintain and operate a single or double track railroad upon the route and lines described, and to use steam locomotive or other appropriate motive power on the said railroad; that the route on which said road was to be constructed begins at the intersection of Calliope street and Hagan avenue, in the city of New Orleans, runs through Hagan avenue to Bienville street, thence by an undescribed route to Barracks or Hospital street, thence to Taylor avenue, through Taylor avenue to Marigny avenue to Florida Walk, through Florida Walk to Montegut street, through Montegut street to St. Claude avenue to the lower limits of the city; that as would be perceived by the terms of said ordinance the said line of railroad to be operated by steam or other motive power crosses the lines and track of petitioner on Canal street at Hagan avenue, and on Metairie road at either Hospital or Barracks street, and petitioner was informed and believed, and so charged that it was the intention of said Watkins and his associates to enter upon the tracks of petitioner, and to intersect the same with the said lines of double track through Canal street and through Metairie Road, and to operate the said road with steam or other motive power, or with both, at their option, under the said grant; that the construction and operation of said line of railroad across the tracks of petitioner would damage petitioner in a sum exceeding one hundred thousand dollars; that petitioner would be compelled to stop each and every one of its electric cars and its steam train before crossing the said tracks going in both directions, each of which stoppages of said trains and cars was a loss and damage to petitioner, and that it would be further delayed by having to wait until the trains of the said Watkins pass; that the crossing of lines such as petitioner's were by a steam line such as the Watkins line might be under said grant would be a source of extreme peril to the property of petitioner and to the lives of its passengers, and that thousands of timid and careful people would be prevented, hindered and restrained through fear of collision at said crossing from traveling on petitioner's trains and cars to its further loss and credit. That it was informed and believed and so charged that the said Watkins and his associates proposed to enter upon the tracks of petitioner and to cross the same without previous compensation to petitioner under the Constitution of the State of Louisiana for the

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damage that would be occasioned thereby to petitioner, and petitioner averred it has the right to contest the validity of the grant made by Ordinance 10,392, Council Series, not only because of the damage and injury that the same would occasion petitioner, but because of the fact that petitioner was a taxpayer of the city of New Orleans as averred in a sum exceeding fifteen thousand dollars per year, and it had the right as such taxpayer to annul void corporate acts of the city of New Orleans in detriment of the interests of the taxpayers. Petitioner, therefore, averred that said ordinance was absolutely null, void and of no effect.

First. Because the same was not advertised and sold at public auction to the highest bidder, as provided by Sec. 4 of Act No. 135 of 1888.

Second. Because the said grant was a valuable franchise, which if put up and sold at public auction would have realized a large sum of money for the treasury of the city of New Orleans, and it was an unreasonable and reckless exercise of corporate authority to donate such a grant without consideration to a private individual. Petitioner prayed for judgment in favor of petitioner, adjudging and decreeing that the said Ordinance No. 10,392, Council Series, and the rights and privileges therein contained and thereunder granted unto the said W. H. Watkins were absolutely null, void and of no effect, and perpetually enjoining the said Watkins from undertaking to construct or operate the railroad provided for in the said Ordinance No. 10,392, Council Series, and, in the event that the court should hold that the said ordinance was valid and that said ordinance authorized the said Watkins to construct and operate the said railroad, enjoining, prohibiting and restraining the said Watkins from entering upon the railroad of petitioner on Canal street and on Metairie Road, and from building the said railroad across the same until the said Watkins had previously made to petitioner compensation satisfactory for the damage and injury to be occasioned to the petitioner by the construction of said road, said damages to be settled either by agreement or by the verdict of a special jury, as provided by law in matters of expropriation.

The District Court rendered judgment in favor of the plaintiff and against the defendant, W. H. Watkins, and its transferee or assign, the "Watkins Railroad Company," decreeing the nullity of Ordinance No. 10,392, Council Series, adopted by the Council of the city

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of New Orleans on March 5, 1895, and perpetually enjoining the said W. H. Watkins and the Watkins Railroad Company from constructing or operating the railroad provided for by said ordinance.

W. H. Watkins and the Watkins Railroad Company appealed.

The date of the approval of Ordinance No. 10,392 was on the 5th day of March, 1895, but the date of its promulgation did not appear.

The opinion of the court was delivered by

NICHOLLS, C. J. The conclusions we have reached in this case make unnecessary any examination of the question whether plaintiff would be entitled to damages for the crossing of its tracks (laid upon the streets of the city of New Orleans), by another road, when such crossing was made under authority of the city authorities so to do, and if so, what the character of such damages would be, and whether plaintiff, if entitled to such damages, would be entitled to enjoin the second road from making the crossing until it should have previously made compensation to it for such damages.

We will confine ourselves to the single proposition whether under the law the Common Council of New Orleans had the power and authority to make the grant embodied in Ordinance No. 10,392. Plaintiff as a taxpayer maintains that it has not, and relies in support of that position upon the fourth section of Act 135 of 1888, which declares that the Common Council "shall not have power to grant, renew or to sell or dispose of any street railroad franchise, except after at least three months' publication of the terms and specifications of said franchise, and after the same has been adjudicated to the highest bidder by the Comptroller, as provided in Sec. 21 of the city charter."

In discussing this question in *East Louisiana Railroad Company vs. City of New Orleans*, 46 An. 526, we said that the "section of the act manifestly applied to street railway franchises, granted for the purpose of operating a road exclusively within the city limits. It did not apply to railroads carrying the mails, and transporting freight and passengers long distances beyond the limits of the city. The Legislature never intended, and in the nature of things such intention would be impracticable in execution, to cause railroads coming into the city from a distance to have the franchise of a right of way. No latitude of construction could

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make the provisions of Sec. 4 extend to other than roads which are operated exclusively within the corporate limits. The fact that plaintiff's road reached the city over another road did not change its character into a street railway. Its attempt to reach the road over which in part it ran its trains was a matter of convenience. Its destination was still beyond the city limits, and practically it was a continuous line of road from the city to its objective point, Covington. If it ran its trains only from its intersection with the Northwestern Railroad within city limits and carried passengers and freight between those points it would be classed as a street railway and come within the purview of Sec. 4. But that was not a fact. The object of the plaintiff company was to carry freight on its own cars beyond the city limits to Pearl River Station, where they would reach their own roadbed. As the road of plaintiff was not a street railway the City Council had the power to grant the franchise without requiring a compliance with Act 135 of 1888. Art. 243 of the Constitution. Consent only was necessary to grant the privilege of a right of way to a railroad running beyond the city limits. Sec. 689, R. S. The city could, as a matter of right, refuse to grant the authority for a passage through its streets of a railroad. It could also demand a price for the privilege. But it could also, as a matter of right, if it deemed the exercise of the power reasonable and proper, grant the right of way to a railroad extending its lines into other territory without a compensation in money but for other considerations."

Section 4 of the act having made use of the word "street railroad" in connection with the prohibition contained therein, defendant's effort is to give such a definition to that term as would exclude the tracks authorized to be constructed and the road to be operated under Ordinance 10,892 from falling under the bar of the fourth section. The carrying of passengers within the limits of the city in contradistinction to the carrying of freight and passengers would seem to be, according to the defendant, the distinctive mark or characteristic of a street railroad. Our decision just cited is supposed to be decisive on that point, but in this there is a mistake. It is true we allude to the fact that the East Louisiana Company carried "freight," but that word has not the importance which defendant attributes to it—the next words "beyond the limits of the city," and the words "in their own cars," have more signifi-

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cance, and the use of these words must be read in connection with the subject matter the court was dealing with. The court was dealing with a special case, and held, that in that case and under the conditions and circumstances shown, the Common Council had the power and authority to grant to the East Louisiana Railroad, without a money consideration (and that fixed as to amount by a bid at public auction), the privilege which it had accorded. The case was one of a simple "right of way" to an existing corporation having its domicile out of the city of New Orleans, with its legal character and its franchises as a railroad corporation already fixed, to continue or extend its line through the streets further into the city. The privilege originated in favor of the company no new resource of revenue, no change in its business was effected, and no additional traffic arrangements were authorized to be entered into. The ordinance took matters up just as they were and simply permitted the moving forward of the *terminus* of the road—nothing more; freight and passengers were not transferred to cars of another line for a consideration, or moved upon another line for a consideration, but were carried straight on upon the company's own line, upon its own cars. We were called upon in the case cited to ascertain what the intention of the Legislature was in enacting the act of 1888, and reached the conclusion that its dominant idea was to deal with franchises or privileges having a money value, and franchises of such a character as would be the subject of competition if the way were left open for the public at large to obtain them at public auction. We reached the conclusion in that case that the privilege granted to the Eastern Louisiana, though it might have a value to the company, and though that value to it might induce it to make liberal offers to the city in one way or another for the purpose of receiving it (thus making it valuable also to the city) was none the less not a privilege for which third persons would be likely to compete, and that therefore it was not within the contemplation of the act of 1888, which looked to an "advertisement" and to "competition" as special factors in determining its prohibitory clauses. We did not decide that an existing railroad corporation carrying freight and passengers, having its domicile beyond the city and coming into it, could simply, by reason of those conditions, be authorized under ordinances of the city to construct a track or tracks from some point inside of its own line and circling

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the city, originate a new character of business inside its limits, and obtain, in and through the ordinance, new, separate and distinct sources of revenue. Under such circumstances, and to that extent, the foreign road would substantially be acting under a new franchise, not its old one.

Our decision substantially so declared. The view of this matter which we took was similar to that taken by the Supreme Court of California in *People vs. San Francisco & S. J. Railway Co.*, 44 Pac. 463.

Referring to a privilege such as was granted to the East Louisiana Company and a contention that, in order to make it valid it should have been put up at public auction, the court said "that under the law 'they (the Common Council) can not grant the privilege to any but the highest bidder,' and the highest bidder may be one who merely desires to prevent the road from passing through, and who can not make use of the franchise except for that purpose.

"In fact the franchise sought is not the subject of competition. A particular railway company desires permission to construct its road through the town, or, in other words, to make a connection through the town of those portions of its road extending upon either side of the town to its opposite *terminus*. In the nature of things there can be no competition for this privilege. The builder of the road must build and operate the whole line. The right to do so is part of its corporate franchise, and how is it possible that any other person or corporation can acquire the right to construct or own and operate as a distinct and independent road and franchise that part of the road necessary to connect its two ends? This law was not intended to apply to such a case, but only to those cases—of street railroads—in which *bona fide* competition is possible."

If we compare the conditions existing at the time of the grant to the Eastern Louisiana road and the precise thing which it was authorized to do under its grant, with the conditions and circumstances existing when Ordinance No. 10,392 was passed, and with the objects and purposes to be accomplished under this last mentioned ordinance, it will be found they are essentially different. The very origin of the business which the new corporation is to transact is found in the ordinance itself—it is a local franchise, new, separate and distinct from any outside franchise, clearly valuable and for which the public would compete in money, if opportunity so to do

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were permitted. The city was not authorized to grant a privilege extending beyond its own limits. It had nothing to do with extensions beyond its own territory.

We do not think the General Assembly intended to use the words "street railroad" in any narrow technical sense, but that its evident purpose was to compel the city to make available for city purposes, and for the public benefit, in money, any local railroad franchise or privilege, which was valuable, and the amount to be derived from the granting of which was likely to be increased by being put up at public auction. So understanding to be the object of the lawmaker, it is our duty to give the statute a liberal construction in aid of its purposes, and this duty on our part carries with it an affirmation of the judgment appealed from, without the necessity of passing upon other questions raised in the controversy.

For the reasons herein assigned the judgment appealed from is affirmed.

No. 12,292.

STATE OF LOUISIANA VS. SYPHER CONERLY.

In order to show that a witness had made statements out of court different from those made by him on the stand, he must be previously cross-examined as to such alleged statements. Such statements must be shown by a Bill of Exceptions to be material to the question at issue—the one made out of court must be shown to have been inconsistent with some fact stated by the witness in his testimony. *Rapalje on Witnesses*, Secs. 203, 205; *State vs. Johnson*, 35 An. 371. "No provocation by words only, however opprobrious, will mitigate an intentional killing so as to reduce the killing from murder to manslaughter."

A PPEAL from the Sixteenth Judicial District Court for the Parish of Washington. *Reid, J.*

M. J. Cunningham, Attorney General, and *Duncan S. Kemp*, District Attorney, for Plaintiff, Appellee.

Clay Elliott, for Defendant, Appellant.

Submitted on briefs November 21, 1896.

Opinion handed down December 14, 1896.

State vs. Conerly.

Defendant was found guilty of murder and sentenced to death. From that verdict and sentence he appeals. The questions presented for review are embodied in three bills of exception.

The first bill recites "that upon the trial of the case the defendant, discovering or believing that a witness for the State who had been dismissed from the stand had made statements contradictory to what he had testified to upon the stand concerning material facts, called the witness back to the stand solely for the purpose of asking if he had ever stated the facts differently, and the witness denied so doing. The defendant then offered to or tendered a witness for the defence for purpose of showing that the State witness had made a statement shortly after the killing different from that made upon the stand. To which offering counsel for the State objected on the ground that no proper foundation had been laid, and that by recalling the witness the defendant had made him his own and could not contradict him, which last objection the court sustained and excluded the testimony. To which ruling defendant excepted and tendered his bill of exceptions."

The court's statement upon the bill is as follows:

The statement reduced by the clerk at the time is annexed. The court sustained both exceptions made by the District Attorney. Counsel for defendant called the witness to the stand without any announcement of a discovery and with no declaration of his purpose, just as he did any other witness summoned by him.

The question to the witness was too general. It did not give time, place nor detail of different statement; the question being: "Have you since the homicide which occurred April 19, 1896, stated the facts differently from your statement now given on October 27, 1896?"

The statement of facts referred to by the court as having been made by the clerk is as follows:

"On the trial of this case the State called Warren Barnes. After offering his testimony in chief it tendered him to defendant for cross-examination. He was cross-examined and returned to the State, and dismissed by the State. Afterward, the State having closed its testimony in chief, the defendant called the witness Abe Mayer, and questioned him as to whether or not he had any conversation with Warren Barnes subsequently to the homicide, and asked him to state such conversation. Upon objection by the State the testimony was excluded. The defendant having concluded the

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examination of the witness Mayer, and, after cross-examination, he having been dismissed from the stand, the defendant called Warren Barnes to the witness stand, and asked him if he had not made certain statements in relation to the homicide, and warned him of an intention to contradict him if he persisted in a denial, and the defendant then tendered him to the State and afterward dismissed him, and thereupon recalled Abe Mayer, and tendered his testimony to contradict the statement of Warren Barnes."

The second bill recites that upon the trial of this case the court charged the jury in the language of Sackett's Instructions to Juries, Sec. 10, p. 681, as follows:

"No provocation by words only, however opprobrious, will mitigate an intentional killing so as to reduce the killing from murder to manslaughter."

That defendant excepted to this charge, and tendered a bill of exceptions.

The court appended to this bill the statement that the homicide was committed with a dangerous weapon, no blows having been struck.

By the third bill it appears that defendant requested the court to charge the jury that "if it should appear that the deceased and the accused were apparently on friendly terms, and that they each with the other suddenly became involved in a colloquy in which each made use not only of insulting language toward the other, but coupled with threats, the killing of the deceased under such circumstances may be wanting in malice and the killing no murder, but manslaughter; that the judge refused to so charge, and defendant excepted."

The court stated in the bill that the charge requested was refused as not correctly stating the law, without serious qualifications and modifications that the homicide was committed with a dangerous weapon—a 38-calibre pistol. The court was of the opinion that the law was correctly stated in the charge excepted to in bill No. 2 and the further complete charge on manslaughter.

The opinion of the court was delivered by

NICHOLLS, C. J. The first question to be considered is whether the defendant, having tendered and offered a witness "for the purpose of

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showing that a State witness named Warren Barnes had shortly after the killing made a statement different from that made upon the stand," the court ruled correctly in refusing to allow said witness to testify on that subject. The witness Barnes had been examined by the State, cross-examined by the defendant and dismissed. After the State had closed its case in chief, defendant called Barnes to the stand, without any announcement of a discovery, and with no declaration of his purpose, just as he did any other witness summoned by him, and propounded to him the question: "Have you, since the homicide, which occurred April 19, 1896, stated the facts differently from your statement now given on October 19, 1896?" The reasons assigned by the judge were that no proper foundation had been laid for the testimony, and that defendant, by recalling the witness, had made him his own, and could not contradict him. The court said the question asked was too general, as it did not give time nor place, nor detail of different statement.

In the statement made by the clerk annexed to the bill, and which is referred to by the court, that officer declares that defendant called Warren Barnes to the stand, and asked him if he had not made *certain statements* (italics ours) in relation to the homicide and warned him of an intention to contradict him if he persisted in a denial, and the defendant then tendered him to the State and afterward dismissed him."

It will be seen that the statement as made by the clerk differs somewhat from that of the court, the latter giving the precise question asked of Barnes, while the former says defendant asked him if he had not made "certain statements" in relation to the homicide.

Though no mention is made of the fact that the statement of the clerk was made by authority and order of court, we presume it was in fact so made, as it is referred to by the court in connection with the bill of exception. The clerk instead of opening a special note of evidence or "taking down" as they occurred, as a scribe, "the facts upon which the bill was reserved," and taking down the testimony of Barnes on the trial, the specific questions asked and the specific objections urged, dealt with the matter by way of "narrative." We do not think that Act No. 118 of 1896 contemplated that "the facts on which the bill was reserved" should be brought up in that way. In this instance there is no "material" difference between the court's statement and that of the clerk.

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We concur in the opinion of the District Court that the question propounded by the defendant to Barnes, on which he bases his right to have introduced testimony to show that he had made statements different from those made by him on the stand, was entirely too general. "A frequent mode of impeaching the credit of a witness" says Rapalje on Witnesses (Secs. 203, 205) "is to show that he has made statements out of court on the same subject inconsistent with or contrary to what he swears at the trial. In order to show this he must be previously cross-examined as to such alleged statements so as to apprise him of the time, place and persons involved in the supposed contradiction (see as to this State vs. Johnson, 35 An. 871), and such statements must also be material to the question at issue. The two statements must conflict in some way. The one made out of court must be inconsistent with some facts stated by the witness in his testimony or with its general drift, but if the two accounts are substantially inconsistent that is all that is required." (Citing De Sailly vs. Morgan, 2 Esp. 691; Christian vs. Coombe, *Id.* 489; 2 Philips on Evidence, 959). It has been held that "proof of a different but not inconsistent statement is inadmissible" (Martin vs. Farnham, 25 N. H. 195; Hall vs. Simmons, 24 Texas, 227).

The same author, writing on the same subject (Sec. 209) says: "The books teem with applications of the *proviso* to the rule we have just been considering, that the statements as to which a witness can be contradicted must be material and relevant to the issue on trial; if the witness is cross-examined as to former statements which are impertinent or immaterial to the issue, his answers are conclusive, and can not be contradicted for the purpose of impeaching him."

In the case at bar we have been informed neither as to what Barnes testified to at the trial, nor what the statements were which defendant claims were different from those made by him on the trial. His testimony may have been purely on immaterial, irrelevant or collateral matters of no moment, and it would be a very unsafe practice to reverse a judgment or verdict upon a mere presumption or possibility that the matters testified to, and those which were sought to be introduced with a view of discrediting the witness, were of such a character as to have resulted in an injury to the accused. Barnes' testimony could have been taken down under the act of 1896, or it could at least have been recited in the bill of exceptions,

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so as to bring us to a knowledge of the importance or materiality of the error of the District Judge, if error he had made, in fact committed.

We see no error in the instruction given by the court to the jury that no provocation by words only, however opprobrious, will mitigate an intentional killing so as to reduce the killing from murder to manslaughter.

The judge informs us that the homicide was committed with a dangerous weapon, and that no blows were struck.

The reasons assigned by the District Court for refusing the special charge asked, which refusal is the subject of the third bill of exceptions, justified his ruling.

For the reasons assigned herein the judgment appealed from is affirmed.

 No. 12,317.

STATE OF LOUISIANA VS. JOHN HAMILTON.

Where an indictment furnished a legal basis for a conviction upon it, the correction of a manifestly erroneous date by amendment, may be permitted when time is not of the essence of the crime charged. *State vs. Pierre*, 39 An. 915; R. S. 1047.

A PPEAL from the Twentieth Judicial District Court for the Parish of Assumption. *Guion, J.*

M. J. Cunningham, Attorney General, and *G. A. Gondran*, District Attorney, for Plaintiff, Appellee.

John Marks for Defendant, Appellant.

Argued and submitted November 21, 1896.
Opinion handed down December 14, 1896.

The opinion of the court was delivered by

NICHOLLS, C. J. Defendant was indicted on the 11th of March, 1892, for cutting with intent to kill and murder. The offence is charged to have been committed on October 18, 1892, a date sub-

48	1556
50	1348
48	1566
111	96
48	1566
125	781

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sequent to the finding by the grand jury and subsequent to the filing of the same. He was found guilty of cutting with a dangerous weapon with intent to kill, and sentenced to an imprisonment of two years. He appealed.

After the jury was empaneled the District Attorney moved to amend the indictment by substituting 1891 for 1892. Counsel for accused objected on the ground that the District Attorney was not vested with the power and authority to make such an amendment, because the amendment was as to a material fact, and because, even if permissible at all, it could not be done after the jury had been empaneled. The court overruled the objection; the amendment was made, and defendant excepted.

Defendant moved in arrest of judgment on the ground that the indictment found against him disclosed no ground or right to try him, "in that it charges him with the commission of a future offence at a date subsequent to the sitting of said jury; that against his protest the District Attorney was permitted to amend the indictment to a year prior; that defendant had excepted and tendered his bill of exception to said action; that said amendment was one which, if not made, would have left the indictment null, void, and of no effect, and accused could not have been convicted under the same, and said amendment was a material change in the indictment."

Counsel for the State call our attention to Secs. 1047 and 1063 of the Revised Statutes, and to State vs. Joseph Jean Pierre, 39 An. 915; 55 N. W. 199.

The first mentioned section (R. S. 1047) permits amendments of indictments to be made in different particulars whenever on or before the trial of any crime there shall appear to be any variance between the statement in the indictment and evidence offered in proof thereof.

By the secondly mentioned section (Sec. 1067) it is enacted that "no indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'as appears by the record' or of the words 'with force and arms,' nor for the insertion of the words 'against the form of the statute' instead of 'against the form of the statutes' or *vice versa*, nor for that any person mentioned in the indictment is designated by a name of office or other descriptive appellation instead of his proper name, nor for omitting to state the time at

State vs. Hamilton.

which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or an impossible day, or on a day that never happened, nor for want of a proper or perfect *venue*; nor for want of the statement of the value or price of any matter or thing or the amount of damages, injury or spoil, in any case where the value or price or the amount of damage, injury or spoil is not of the essence."

The next section (Sec. 1064) authorizes courts before which objection to an indictment for any formal defect apparent on the face thereof shall be taken to cause the indictment to be forthwith amended in such particular and authorizes the trial to proceed as if no defect had appeared.

In *State vs. Pierre* (39 An. 915) objection was raised by the accused to the District Attorney making a correction in the indictment of the date at which the crime was charged to have been committed—by changing 1887 to 1886—on the day the cause was called for trial and after the jury had been empaneled, but prior to the commencement of the trial. The date laid in the indictment for the commission of the offence was the 22d of December, 1887—a date which had not yet arrived, and hence an impossible one. The record showed that the Grand Jury only returned the bill into court on the 8th of September, 1887, making the one given in the indictment a manifestly erroneous date.

The court declared that in the crime of horse stealing the date at which it was committed was not of its essence, and that the correction was properly permitted.

On the argument of the present case counsel abandoned the position that the indictment, as originally laid, was null, void and of no effect, because of the date at which the commission of the crime was charged, but maintained that having been so charged, it could not be altered by amendment.

The indictment, as found, being admitted to have furnished a legal basis for a conviction upon it, we are of the opinion that the sections of the Revised Statutes quoted, and the decision of this court in *State vs. Pierre*, control the case before us.

The judgment must therefore be and it is hereby affirmed.

State vs. Brown.

No. 12,267.

STATE OF LOUISIANA VS. THOMAS BROWN.

The repeal of statutes by implication is not favored.

The two statutes are not in irreconcilable conflict. Hence, the new law does not repeal the old law.

A PPEAL from the Eighteenth Judicial District Court for the parish of Lafourche. *Caillouet, J.*

M. J. Cunningham, Attorney General, *L. C. Moise*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellant.

John S. Billiu for Defendant, Appellee.

Submitted on briefs November 7, 1896.

Opinion handed down December 14, 1896.

The opinion of the court was delivered by

BREAUX, J. The defendant was charged with shooting with intent to commit murder. He was found guilty of an assault with intent to kill.

A motion in arrest of judgment was filed upon the ground that Sec. 792 of the Revised Statutes was repealed by Act 59 of 1896.

The trial judge sustained the motion in arrest on the ground stated in the motion.

In two cases recently decided, this court held that the Sec. 792 of the Revised Statutes is not repealed as to offences committed prior to the adoption of Act 59 of 1896; that the punishment under the old law was not changed by adding a number of years as a *maximum* of punishment under the new law, and that in prosecutions under the old law for past offences the last law presented no obstacle to trial and conviction.

The judgment of the District Court is annulled, reversed and avoided.

It is now ordered that the case be remanded; that it be reinstated on the docket of the District Court, and that the accused be sentenced in accordance with the terms of the verdict.

Nicholson vs. Board of Assessors et al.

No. 12,268.

THE STATE VS. JONAS JONAS.

The court affirms the decision in State vs. Meaux, 48 An. 1517.

PPEAL from the Eighteenth Judicial District Court for the Parish
of Lafourche. *Caillouet, J.*

M. J. Cunningham, Attorney General, and *L. C. Moise*, District
Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellant.

Defendant appellee unrepresented by counsel.

Submitted on briefs November 7, 1896.

Opinion handed down December 14, 1896.

The opinion of the court was delivered by

MILLER, J. The accused was indicted for assault and convicted for assault. The lower court declined to sentence on the ground that Sec. 792 of the Revised Statutes, on which the prosecution was based, had been repealed by the Act No. 59 of 1896. We have held there was no such repeal. State vs. Meaux, 48 An. 1517, not yet reported.

The State appeals from the judgment of the lower court declining to pass sentence, and, as we have held the Sec. 792 is still in force, the case must be remanded with direction to sentence.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be reversed and set aside; and it is now ordered, adjudged and decreed that the lower court pass sentence on the accused in accordance with the verdict.

No. 12,277.

MR. AND MRS. NICHOLSON VS. BOARD OF ASSESSORS ET AL.

The plaintiffs, owners of a Mergenthaler Linotype Machine, with which they manufacture linotypes in publishing the New Orleans *Picayune*, are not manufacturers of machinery within the intentment of Art. 207 of the Constitution. Further, they do not supply dealers and consumers; a requisite for exemption.

34 An. 597; 35 An. 747; 36 An. 347.

Nicholson vs. Board of Assessors et al.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

W. B. Lancaster for Plaintiff, Appellant.

Samuel L. Gilmore, City Attorney, and *W. B. Sommerville*, Assistant City Attorney, for Defendants, Appellees.

Argued and submitted December 2, 1896.

Opinion handed down December 14, 1896.

The opinion of the court was delivered by

BREAUX, J. This is a suit for the canceling of an assessment on the ground that the property is exempt from taxation.

The plaintiffs are the owners of machinery known as Mergenthaler Linotype Machines. The evidence reveals, as the principal witnesses substantially express it, that the machine is intended to manufacture lines of types on the principle that the actual metal type is manufactured, but that instead of being manufactured singly, as the ordinary type, the types are manufactured in lines, by means of moulds or matrices; that is, that instead of producing a single type it produces type metal bars with type on upper margin of the bars, to print a line.

The machine is controlled by finger keys. The type is manufactured of molten lead by the machine. The lines are produced automatically and in order, and constitute a form similar to the ordinary form consisting of single types. The type metal bars, with letters on one end, take the place on the galley, which is filled, under the old process, by the type manufactured singly.

We are informed that it is a very complicated machine and quite intricate in its movements.

Plaintiff alleges that this machine is used to manufacture other machinery, and that both the machine and the type it produces are exempt from taxation by Art. 207 of the Constitution.

The argument for plaintiffs confines the controversy to the question:

Is the manufactured line of type, or the form produced by the linotypes assembled side by side in proper order, machinery?

An affirmative answer to the question propounded would have the effect of exempting the linotype.

The Constitution exempts only the articles of property named in the Art. 207. In addition: To be exempt by that article one must be a manufacturer.

Plaintiffs claim that the linotypes manufactured by the linotype machine are part of the machinery by which the *Picayune* newspaper is published, and that, as such, it is exempt from taxation.

In *Nicholson and Wife vs. Tax Collector*, 44 An. 76-78, this court held: "Article 207 exempts from property tax only manufacturers of certain designated articles."

The articles the plaintiffs claim to be exempt are not among the designated articles; the exempted articles are textile fabrics, leather, shoes, harness, saddlery, hats, flour, *machinery*, agricultural implements and furniture and other articles of wood, marble or stone, soap, stationery, ink and paper, boat building and chocolate. (Italics ours.)

Again, in another case it was held: "It is not sufficient, under the latter article, for them to be manufacturers simply, but they must be manufacturers of some of the particular articles specified therein." *State ex rel. Ernst & Co. vs. Assessors*, 36 An. 347.

The linotypes, although they are indispensable parts of the printing machinery, are not themselves machinery.

It is admitted that they are only parts of the machinery in use in publishing the *Picayune* newspaper.

Without the admission; we do not think we would be justified in deciding that they are machinery and exempt.

They have not the construction of parts required to constitute machinery.

It is said in the brief for plaintiffs that the printing machine or press could not be usefully operated without them.

That is doubtless true.

May it not be said that the ordinary hammer also, or the lever, may be made an essential part of machinery. It would not for that reason be machinery. The same may be said of the needle of a sewing machine, and of many other instruments or tools, not, of themselves, machinery.

The mechanical action is entirely subordinate to the machinery. The linotype is only one of the instruments or pieces of the machinery.

Succession of Nash.

Machinery is machinery collectively, the congeries. The pieces separately have not the importance of the whole machinery. In many factories and even in shops there are devices made by machinery that would be exempt, if we were to decide that pieces manufactured in those factories or shops made to do service in machinery are exempt from taxation, even although the shops or factory itself may not be exempt.

We do not think that such exemption was intended by those who adopted the article as part of the organic law.

We have given the subject our most careful consideration.

From any point of view we are totally unable to discover that plaintiffs are the manufacturers of machinery.

In addition, we must say that they are not suppliers of dealers and customers; they do not sell the linotypes. This was made a requisite of exemption from property taxation by the terms of several decisions of this court. *New Orleans vs. LeBlanc & Beck*, 34 An. 597; *City vs. Ernst*, 35 An. 747; *State ex rel. Ernst & Co. vs. Assessors*, 36 An. 347.

The judgment appealed from is affirmed.

No. 12,186.

SUCCESSION OF MRS. MARY L. NASH.

A purchaser at a judicial sale who, before paying the price, or entering into the possession of the thing sold, discusses illegalities in the proceedings which have led to the sale, calculated to throw a cloud upon his title, may refuse to execute the purchase. 9 An. 560.

The presumption *omnia rite acta fuisse*, created by the law for his protection, can not be invoked against him, as an estoppel, although available to throw the burden of proof upon him of the illegalities of which he complains. *Id.*

The decree recognizing the widow as heir of the husband, and placing her in possession, did not, at the end of three years (C. C., Arts. 931, 932), definitively fix her status as such, and bar the rights of the real heirs of the husband to a recovery of his succession as against the wife and her succession.

When property inventoried as belonging to the deceased wife, held by her under such a decree, is offered on proceedings invoked by her executor at public auction and adjudicated, the purchaser at such sale may object to accept title, and show that the deceased husband left collateral heirs surviving him, and then living; in such a proceeding the question at issue is the ownership of the property sought to be forced upon the purchaser, an objection more formidable than mere regularity of proceedings.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

48	1573
49	479
48	1573
52	963
48	1573
105	95
48	1573
110	839

Succession of Nash.

Dinkelspiel & Hart for Executor, Plaintiff in Rule.

Frank N. Butler and *James Boyd Grinage* for John Otnott, Defendant in Rule.

Argued and submitted November 19, 1896.

Opinion handed down December 14, 1896.

The opinion of the court was delivered by

NICHOLLS, C. J. On the 11th of February, 1890, Mrs. Mary Lamb, widow of James K. Nash, filed a petition in the Civil District Court, in which she alleged the death of her husband on the 6th of that month; that he died intestate, leaving no issue; that he left an estate consisting of movable and immovable effects situated in the city of New Orleans, and which composed his share of the community property existing between himself and petitioner; that he left no other property; that under the law she was entitled to one-half in full ownership of all the community property left by her said husband, and to the usufruct of the other half to last during her natural life, or until she remarried; that she desired to be recognized and put in possession of said property in both said capacities. She prayed that she be recognized as widow in community of her late husband; that as such she be put in possession of one-half of the property in full ownership, and that she be put in possession of the other half as usufructuary, her usufruct to last and continue during her natural life, or until she remarry.

Upon this petition the court, on February 12, 1890, rendered an order or judgment, in which it declared that the law and the evidence being in favor of the demand of the petitioner she was recognized as the surviving widow in community of Nash, and that as such she be put in possession of one-half in full ownership of all the community property, and that she be put in possession of the other half as usufructuary, the same to continue during her natural life, or until she remarry.

On the 14th of March, 1890, the widow filed another petition, in which, after reciting the judgment above mentioned, she averred that to the best of her knowledge and belief her husband left no heirs;

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that he never had any children; that his parents died before him, and he had no brothers, sisters or collaterals; that she was entitled, therefore, to be recognized as the owner of the whole property left by her husband in her capacity of widow in community and sole heir; that under the law, in order to have herself properly put in possession, the taking of an inventory and the appointment of an attorney for absent heirs were necessary; she, therefore, prayed that an attorney be appointed to represent the absent heirs of the deceased, and that an inventory of all the property left by the deceased be made. Upon this petition the court ordered an inventory to be taken as prayed for, and appointed A. Bernau, attorney at law, to represent the absent heirs. An inventory was taken under this order; A. Bernau being present thereat in the capacity of attorney of absent heirs.

On the 11th of July, 1890, the widow of Nash, through her attorneys, obtained from the court a rule on A. Bernau, appointed to represent the heirs of the deceased, to show cause why judgment should not be rendered in her favor recognizing her as sole heir at law of her husband, and sending her into possession of all the property left by him, upon her complying with Arts. 929 and 933 of the Civil Code. The rule issued on suggestion by her to the court that the deceased left no heirs, and that she was entitled to such judgment.

Service of this rule was accepted by Aug. Bernau, signing as attorney, etc.

On November 14, 1890, on motion of the counsel of the widow, the rule was fixed for trial on November 21, and the attorney of absent heirs was ordered to be notified thereof. On November 10, 1890, Aug. Bernau accepted service of the motion as attorney of absent heirs.

On December 5, 1890, the court rendered a judgment in the rule ordering that it be made absolute. That Mrs. Widow M. Nash be recognized as the sole and only heir of her husband, and that she be sent into possession of all the property left by him upon her complying with Arts. 929 to 933 of the Civil Code. The judgment recited that the rule had been submitted by counsel, and that it had been made absolute by reason of the law and the evidence being in favor of plaintiff in the rule. On the 17th of December, 1890, the widow furnished bond with security conditioned that "should, within the

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space of three years from date, any heir at law of James K. Nash appear and claim their share of his succession, that same would be delivered or accounted for by her, in which case the bond should be null and void, otherwise to remain in full force and effect."

Mrs. Mary Lamb, the widow of James K. Nash, died on July 17, 1894, in New Orleans, leaving a will, in which she appointed W. O. Hart as her executor, without bond and with seizin.

The will was probated and Hart qualified as executor thereunder. An inventory having been ordered to be taken of the property belonging to the succession of Mrs. Nash, such inventory was made on the 26th of July, 1894. Certain real estate in the city of New Orleans was placed upon this inventory as "belonging to the deceased in whole or in part as widow of James K. Nash, as per proceedings had in his succession." Upon the application of the executor the inventory was approved and homologated.

On November 9, 1894, the executor applied for and obtained from the District Court (Division E) an order for the sale at public auction of the real estate which had been inventoried on terms partly cash and partly credit; acts of sale to be passed before a notary public. The order was obtained on the allegation of the executor, that he had no funds in his hands belonging to the succession; that a sale was necessary to pay the debts of the deceased, the cost of building her a tomb as directed by the will and to pay the special legacies made.

On the 14th December, 1894, the auctioneer filed in court his *proces verbal* of his actions and proceedings under the order of sale directed to him.

By this *proces verbal* it appears that three of the pieces or lots of ground inventoried were adjudicated to John Otnott as the last and highest bidder for the sum of twenty-two hundred dollars. No deed of sale followed the adjudication. On January 23, 1895, the attorneys of the executors appeared in court in the succession of Mrs. Nash and suggesting that the property had been adjudicated to Otnott, as appeared by the *proces verbal*, and that he had failed to comply with his bill, obtained from the court a rule on the adjudicatee to show cause why he should not comply with the adjudication forthwith and pay the price thereof, or in default thereof that the property adjudicated to him be sold at his risk and expense and for her account.

On February 4, 1895, Otnott urged as cause:

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1. That the property was inventoried in the succession of James K. Nash as property of the community existing between him and his wife, and it did not appear from the proceedings had in said succession or otherwise that his widow had acquired full and absolute title and ownership of her husband's share of said property.

2. That the judgment rendered in the succession of the husband putting his surviving widow in community in possession of said property for want of lawful relatives under the provisions of Arts. 929 and 981 of the Civil Code gave her no greater substantial rights in connection with said property than she had prior to its rendition, and did not and could not deprive the lawful heirs of James K. Nash, if any exist, of their legal shares of and rights in said property.

3. That no evidence existed or had been placed of record in the Civil District Court or in the Conveyance Office of the parish of Orleans, showing that the husband died without leaving any forced or legal heirs, and in the absence of sufficient proof, that no such heirs survived him, his widow in community could not and did not acquire full and indefeasible title to said property.

4. That he had just been informed that said James K. Nash left collateral relatives surviving him who are now living, and a reasonable delay should be granted him to verify said information.

5. That all the requisite proceedings preliminary to the aforesaid judgment of possession had not been had.

6. That all the requisite proceedings for the sale of said property in the succession of the widow of Nash had not been had.

On the 28th day of April, 1896, the rule after a trial was made absolute, the court ordering the adjudicatee, Otnott, to comply with the adjudication made to him within thirty days from the date of the signature of the judgment, and ordering in default of his so doing that the property adjudicated to him be sold at his risk and for his account.

From that judgment Otnott has appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. The articles of the Civil Code which bear upon the issues before us are the following:

Article 917. When the deceased has left neither lawful descendants nor lawful ascendants, nor collateral relations, the law calls to

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his inheritance either the surviving husband or wife, or his or her natural children, or the State, in the manner and order hereafter directed.

Article 924. If a married man has left no lawful descendants nor ascendants, nor any collateral relations, but a surviving wife, not separated from bed and board from him, the wife shall inherit from him to the exclusion of any natural child or children duly acknowledged.

Article 930. The surviving husband or wife called to the succession of the other who is deceased must cause the seals to be fixed on the effects thereof, and be authorized to take possession of the same by the judge of the place in which the succession is opened, after having caused a true and faithful inventory to be made by a notary, duly authorized to that effect by the judge, in the presence of a person appointed to defend the interests of the absent heirs of the deceased, in case there are any, and after giving good and sufficient security, as prescribed in the following article:

Article 931. The security to be given by the surviving husband or wife, who shall demand to be put in possession of the effects of the deceased husband or wife, is to be of the estimated value of those effects, to the end of securing the restitution of the estate, in case any heir should come forward within three years after his or her having been put in possession, which term being expired, the security shall remain discharged from his obligation.

Article 932. During the three years that the security furnished by the surviving husband or wife or natural children put in possession continues, they can not, in any manner, alienate the immovables by them thus possessed, unless it be under the authority of the court, at public auction, and in cases in which their alienation is necessary.

Article 933. The surviving husband or wife and natural children, who shall fail to fulfil any of the formalities or obligations prescribed in the preceding articles, shall be liable to damages toward the heir, if any should be incurred.

On the trial of the rule defendant offered in evidence a certified copy of a petition filed April 20, 1896, by Dennis Leavey and Mrs. Ann Nash, widow of Pierce Strange, in the Civil District Court of New Orleans, in which the latter, after averring herself to be a sister of James K. Nash, and the former to be his nephew, and that they were legal heirs of the said Nash, asked that W. O. Hart, as executor of Mary L. Nash, wife of James K. Nash, be cited, and that the

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property of the community between Nash and his wife (describing as part of said property that adjudicated to the defendant) be partitioned between themselves and other mentioned heirs of James K. Nash, and the succession of Mary L. Nash, by a sale of said property at public auction. He also offered in evidence the testimony of the said Mary Ann Nash (Widow Strange) and Thomas F. Strange, taken to establish the heirship of the plaintiff in the partition suit above mentioned as heirs of James K. Nash.

The executor objected to the introduction of the evidence on the ground that the documents were irrelevant and inadmissible.

1. Because the copy of the petition filed by Dennis Leavey and others was inadmissible and irrelevant, having been filed long after the adjudication to defendant in rule, and therefore in nowise binding upon them, and because otherwise irrelevant to the issue in the case.

2. The testimony of Mrs. Ann Nash Strange was inadmissible, because neither she nor the persons referred to in her testimony were parties to this suit. They had made no claim up to the time of testifying to the property involved, and even if they had any claim, it was against the proceeds of sale and not against the property. The court overruled the objection on the ground that the objections raised went to the effect of the evidence and not to its admissibility. The evidence was received and the executor reserved a bill of exceptions.

The necessities of this case do not require us to examine into and pass upon the regularity and validity of the proceedings which preceded the order of the District Court recognizing Mrs. Nash as heir of her husband and placing her in possession of the property which had belonged to the community between them. We may assume for the purposes of this litigation that they were strictly regular and that the wife held possession of the property in absolute good faith for over three years prior to her death. The question is (assuming such a condition of affairs) whether a purchaser at a judicial sale made in the succession of Mrs. Nash, who refuses to comply with his bid, can be legally forced to do so, when prior to paying the price and going into possession, parties claiming as heirs of the husband appear and institute a suit against the executor for the partition of the same property.

The executor claims that from the moment of the adjudication to

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Otnott the title to the property become absolutely vested in him and he could no longer recede from the purchase. He further claims that the creditors of Mrs. Nash from the moment of the adjudication acquired fixed rights upon the price, and therefore the situation has to be dealt with from the standpoint of the rights of "third parties" being involved in this controversy.

In Succession of Gassen vs. Palfrey (9 An. 560) the same position was advanced by the administrator, the argument being that the purchaser would be protected by the decree, and had no ground for apprehension. He cited a number of decisions in support of this contention. Of these, this court said they were all petitory actions brought by persons claiming under those whose title had been divested by a judicial sale against the purchasers at such sale or their assigns after the sale had been consummated by the payment of the price and followed by a long possession of the thing sold on the part of the purchaser. That it recognized fully that doctrine, but that it was not applicable to the case before it, which was that of a purchaser at a judicial sale, who, before paying the price, or entering into possession of the thing sold, discovered irregularities in the proceeding which led to the sale, calculated to throw a cloud upon his title. "For such a person," said the court, "there is a *locus penitentiae* afforded by the misconduct or negligence of those with whom he had contracted and who are the warrantors of his title. The presumption *omnia rite acta fuisse*, created by the law for his protection, can not be invoked against him as an estoppel, although available to throw the burden of proof upon him of the irregularities of which he complains."

In the case at bar, the ownership of the property sought to be forced upon the purchaser is at issue, an objection more formidable and radical than mere regularity of proceedings. Plaintiff invokes here, as did plaintiff in the Palfrey suit, a rule against a purchaser which was intended for his protection. The present suit is not one where the purchaser at the succession sale having complied with his bid and gone into possession of the property, the heirs of the husband are seeking to recover as against him the property on the strength of the original title, while the defendant is resisting on the strength of the judicial proceedings recognizing the wife as heir, her subsequent possession for over three years and the sale made in her succession. Were this suit of that character, it might be granted that defendant would present strong grounds for protection.

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It would by no means follow from this assumption that the administrator of a succession holding in reality a title to only an undivided half of the property should be permitted to insist upon the consummation of an incomplete divestiture of the title of his co-owners. A shield for the benefit of purchasers buying on the faith of judicial proceedings and probate decrees should not be converted into a weapon in the hands of parties selling without actual rights. We scarcely think it is pretended that the effect of the decree recognizing Mrs. Nash as the heir of her husband and placing her in possession was, at the end of three years, to definitively fix her *status* as such, and to bar the rights of the real heirs of the husband to a recovery of his succession, as against the wife and her succession. If, however, plaintiff means to assert here such a claim, it is utterly untenable. So far as the creditors of the succession of Mrs. Nash are concerned, they do not occupy the same position as would purchasers of that property who had completed their purchase and stood upon their rights as such. They have no fixed right upon the property, and hold "*under*" the rights of Mrs. Nash, and not "*beyond*" them.

We think that the purchaser in this case has made such a showing that James K. Nash left at his death collateral relations who became his heirs as to entitle him to relief. The evidence which the court allowed defendant to introduce on the trial was properly admitted.

The rights of the heirs of the husband as between themselves and the wife or her succession were not cut off by the succession sale. There is now pending a suit in which those heirs are asserting their ownership of one-half of this property. The fact that they did not do so until after the institution of this proceeding, and that they are not parties to the same, are, in this controversy, immaterial facts. The important fact is the existence of the rights themselves. This fact the defendant was entitled to show.

For the reasons herein assigned it is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed. It is now ordered and adjudged that the rule taken against defendant be dismissed, with costs in both courts.

Chalaron vs. Insurance Co.

No. 12,161.

JAMES A. CHALARON VS. INSURANCE COMPANY OF NORTH AMERICA.

The statement to the reinsurer made by the original insurer in obtaining the reinsurance, "we carry our line," no amount of the line specified, will not be deemed falsified, if in point of fact the insurer does bear a part of the risk, *i. e.*, to the extent not reinsured.

Nor in respect to another risk, part of which was reinsured, is the reinsurance avoided for fraud because of such statement in obtaining the reinsurance, although it turned out the insurer bore no part of the risk, owing to the fact the insurer did not put on board the entire cargo agreed to be insured by the original insurer, he believing, when he effected the reinsurance, such cargo would be at risk, in which case he would have borne a part of the risk. 8 Kent, 284; Wood on Insurance, Sec. 290 *et seq.*

The reinsurance may be for the whole or part of the risk taken by the original insurer, and the effect of reinsurance is to bind the reinsurers to make good to the original insurer the loss up to the amount reinsured. 8 Kent, p. 276; Elliott on Insurance, Sec. 8; Biddle on Insurance, Sec. 378.

Reinsurance not to take effect except above a stated amount of loss, a contract of a special character can not be inferred from the mere statement of the original insurer in effecting the reinsurance, "we carry our line," least of all, when the written contract of reinsurance is in the ordinary form of insurance against loss to the extent of the amount specified in the policy.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

O. B. Sansum (Percy Roberts of Counsel) for Plaintiff, Appellant.

Saunders & Miller for Defendant, Appellee.

George Wharton Pepper and J. Bayard Henry on the same side, submitted a brief.

Argued and submitted June 6, 1896.

Opinion handed down December 14, 1896.

The opinion of the court was delivered by

NICHOLLS, C. J. The plaintiff, suing as representing several of the New Orleans insurance companies, seeks to recover money claimed to have been paid in error by them on their contracts reinsuring maritime risks of the defendant, the Insurance Company of North America.

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In 1862 the defendant insured the cargo of the bark *Yorkshire* for sixty thousand dollars, reinsuring with three of the plaintiff companies for seventeen thousand five hundred dollars, and for twenty-seven thousand five hundred dollars in other companies, making the total reinsurance forty-five thousand dollars. On this risk there was a loss of fifty one thousand six hundred and one dollars collected by defendant from the reinsuring companies—the New Orleans companies paying the seventeen thousand five hundred dollars for which they reinsured, other reinsuring companies paying their portion, and the residue, amounting to twelve thousand five hundred dollars, was paid by the defendant as part of the risk they carried, that is without reinsuring. In the same year the defendant insured the cargo of the bark *Budstiken*, the proposed risk being thirty-five thousand dollars, but only a part of the cargo was laden on board. The reinsurances on that cargo were ten thousand dollars with four of the plaintiff companies, and like amount with other companies, making the total reinsurances twenty thousand dollars on that risk. On that risk there was a loss nearly equal to the amount of the reinsurances, and defendant collected the ten thousand dollars from the plaintiff companies, and a like amount from the other reinsurers.

In 1888 defendant took a risk on the cargo of the bark *Adele* of one hundred and fourteen thousand dollars. There were reinsurances in five of the plaintiff companies for fifteen thousand dollars, in other companies for forty-six thousand five hundred dollars, making sixty-one thousand five hundred dollars reinsurances. There was a loss on the cargo put on board of nineteen thousand three hundred and nine dollars, all of which was collected by defendant of the reinsurers.

Plaintiff claims that the understanding in effecting these reinsurances was that the defendant was to carry its line and reinsurance excess, by which we understand that defendants were to retain part of the risks and to reinsure to the extent of that portion of the risk it did not propose to bear. Under bills of exception reserved, they introduced evidence for the purpose of establishing this understanding, and to establish that it was a custom in the city of New Orleans for the reinsurer to carry part of the risk.

Following the negotiation between the parties the plaintiff companies issued certificates, which, on their face, are certificates of unconditional insurance, to cover loss on the cargoes of the York-

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shire, for seventeen thousand five hundred dollars; on that of the Budstiken ten thousand dollars, and on that of the Adele for fifteen thousand dollars. Defendant maintains that the obligation of the plaintiff companies was precisely that expressed in the certificates to pay the losses sustained up to the amounts distinctly stated. Plaintiff, on the contrary, insists that the contracts are to be deduced from the testimony, and that the testimony shows contracts of an entirely different character.

On his theory the companies he represents, with the other reinsurers, were liable for only sixteen thousand six hundred dollars on the loss of fifty-one thousand six hundred and one dollars on the cargo of the Yorkshire—that is, for the excess of fifty-one thousand six hundred and one dollars over thirty-five thousand dollars, the asserted line of defendant—that they were bound for no part of the loss of nineteen thousand dollars on the cargo of the Budstiken, as the loss was under defendant's line—that on the general average loss of forty-seven thousand dollars on the cargo of the Adele, the plaintiff companies, with the other reinsurers, were only liable for twelve thousand dollars, the excess of loss over defendant's assumed line of thirty-five thousand dollars—the defendant being liable also, it is insisted, for a general average contribution. The issue of fraud made by the petition that defendant intended reinsuring the entire risk and failed to disclose it, declaring they retained a line, when it is averred they retained none, is not formally waived, but the contention in this court is mainly that plaintiff's liability was only for the loss over defendant's asserted lines.

The case is before us on the certificates. We must accept them as the written contracts of the parties. We first direct our attention to the preliminary question raised by defendant to the introduction of testimony to establish any custom or any understanding to contradict, or vary the contracts of unqualified insurance expressed in the certificates. In view of the allegations of the petition we will consider the evidence, giving due weight to the certificates. When the written contract is assailed as not embodying the intentions of the parties, testimony to that end should carry conviction of the error.

The petition imputes fraud in the defendant in effecting their reinsurances. It charges concealment of the reinsurance of the entire risk and misrepresentation implied by the alleged custom, and by the statement of defendant's agent, "we carry our line."

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We have been referred to the decision in 13th Annual (Louisiana Mutual Insurance Company vs. New Orleans Insurance Company, 13 An. 246). The case was one of reinsurance of sugar, in which the insurer stated in his application that he had a risk on the building, when, in fact, he carried none. The court held that the representation was material and its falsity avoided. The *syllabus* in the case declares that, in regard to reinsurance, the custom among underwriters in the city of New Orleans is to divide the risk and not take the whole of it—that when the application is silent this is always understood.

We do not think that an argument seeking to maintain that any custom determines the amount of the risk the original retains in effecting reinsurance is sustainable. Reinsurances necessarily vary in amount, according to the nature of the risk, the judgment of the insurer as to the extent it is judicious to reinsure, and the amount the reinsurer is willing to accept. Reinsurances depend entirely on the stipulation of the parties—a reinsurance without specification of the amount reinsured is not one on which it can be supposed business men would enter. Reinsurance is, as one of the witnesses expresses it, “fluctuating.” Each company determines its own line. We can not accept as correct the proposition that in New Orleans custom divides reinsurances between the insurer and the reinsurer. We must take judicial cognizance of reinsurances for any and all amounts according to the views of the parties. There is no division of risks sought here—that kind of an apportionment would not benefit plaintiff, and it has no relation to the issues. Witnesses often mistake for custom their impressions, individual experiences or methods of business, and not infrequently deem that to be custom in its legal sense which is merely the course of business the law itself enforces.

Reinsurances, while they may be of the entire risk, are ordinarily of such portion of the amount the insurer deems proper to reinsure. 1 Kent, S. p. 278. Hence it may be said in reinsurances the general rule is the original insurer retains part of the risk, and in the event of total loss, to that extent of the amount retained, shares the loss with the reinsurers.

If this is not the reinsurance desired, but the reinsurance of the entire risk, for obvious reasons good faith exacts that that purpose should be stated to the reinsurer. All that any custom would enforce was implied by the expression of defendant’s agent. He announced,

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as was customary, that the entire risk was not to be reinsured, but the insurer bore part. All that can be said of any usage bearing on this controversy is that in reinsurances the original insurer, without express statement to the contrary, retains part of the risk, and that amount no custom fixes. We are not dealing here with reinsurances of the entire risk, as the petition alleges, and the argument in some of its aspects seems to maintain. The testimony shows that on each of these risks the insurer proposed to bear part. On the Yorkshire risk of sixty thousand dollars, the reinsurances were only forty-five thousand dollars, and defendant paid its part of the loss of fifty-one thousand dollars. On the Adele risk of one hundred and fourteen thousand dollars, the property actually put on board being ninety-one thousand dollars, the reinsurances were sixty-one thousand dollars, and a total loss would have been borne partially by the defendant. As neither the negotiation nor any custom fixed the amount of the risk on those cargoes to be retained by the defendants, and as it did bear a part of the risks, we do not see, in any aspect of custom or fact, any basis for plaintiff's allegation of concealment and misrepresentation.

There was no reinsurance of the entire risk, hence there was no concealment—there was in each case a part of the risk borne by the defendant, hence there was no misrepresentation in the use of the expression “we carry our line.” There is no more basis for avoiding the reinsurance in the case of the Budstiken than in that of those we have just considered. Avoiding an insurance for alleged concealment or misrepresentation is a question not for any custom to solve, but one of law for judicial determination. The custom, if any bearing on the subject, may be an incident in the investigation, but the law alone is to ascertain the influence and effect of the supposed misrepresentation. The obligation of a faithful disclosure of all facts material to the risk resting on the reinsurer, the same as on the original insurer, is to be understood in a reasonable sense. The rule exacts the communication of facts, not contingencies. If the information is stated as opinion, expectation or belief, it does not affect the policy if given in good faith—in such case the insurer takes the risk of the statement—if made in bad faith it will avoid the policy. 3 Kent, S p. 284. When reinsurance on the Budstiken was effected, the risk accepted was thirty-five thousand dollars. Of that risk defendant proposed to bear fifteen thousand dollars, hence the rein-

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insurance was twenty thousand dollars; ten thousand of which was with the plaintiff companies. But the assured failed to get the expected cargo of thirty-five thousand dollars, but placed on board goods to the extent only of twenty thousand dollars on which the loss was sustained, and the reinsurers paid. We can not hold that this reinsurance of ten thousand dollars was made void by the unforeseen failure of the insurer to put on board cargo of equal value to the amount of the risk sought and accepted. The authorities cited in this connection relate to statements of facts that had no existence, made to induce the acceptance of the risk by the insurer. Thus the representation that the insurer was a man of pecuniary responsibility when he was not—that other insurances had been obtained, a fact tending to show that other insurers deemed the risks good, when there was no such other insurances, and the case from our own court, of reinsurance of sugar obtained upon the false representation that the insurer itself carried a risk on the building when it did not do so, are all instances of false representations as to facts claimed to exist, but which had no reality. These decisions and the principles on which they rest have no application here. The representation in this case that defendant carried its line on the cargo the insurer was to put on board had the prospective significance that the unforeseen, against which none can guard, might prevent the complete loading. The subsequent event, that the cargo to the full amount was not put on board, can not stamp as fraudulent representations, made in all sincerity and truthfulness at the time. Another test might be applied. Suppose the defendant, with a prescience not of men, had foreseen the contingency of the failure to deliver the expected cargo, and indicated that possibility to the plaintiffs, is it to be supposed the reinsurers of ten thousand dollars on a much larger risk, part of which the insurer expected to bear, would have been declined, because of the possibility of the failure to deliver a full cargo which would leave no part of the risk for the original insurer. That bare possibility, in our opinion, would have exerted no influence on the reinsurer, otherwise fully content to reinsure. We think the reinsurance on the cargo of the *Budstiken*, as on that of the *Yorkshire* and the *Adele*, must stand. 3 Kent, 284; Wood on Insurance, Sec. 290 *et seq.*

We now turn to an examination of the extent of the liability of the companies.

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We are asked to substitute for the contracts of unconditional reinsurance expressed in the certificates the contract of the different character claimed to be established by the testimony of the officers of the companies. If these insurances were of the special character to cover losses only above the amounts placed before us in plaintiff's argument, it is strange there should have been no specification of these amounts in the negotiation or application. In insurances of that character the minds of the parties are necessarily directed to the fixed amount above which the assured seek indemnity, and below which the insurer is resolved to incur no liability. Plaintiff insists the companies insured only the amount of loss over defendant's line. We find a general statement from some that defendant's line was understood to be forty or fifty thousand dollars. How does that statement fix defendant's line on these risks of thirty-five thousand dollars, sixty thousand dollars and one hundred and fourteen thousand dollars? One witness states that the "line" is proportioned to the capital of the company; another that the "line" of a company is the amount not reinsured; another that the "line" fluctuates to be determined by the company. If, in these cases, the line was to be fixed by the reinsurances, whatever the amount, then the risk of these companies was dependent entirely on the disposition or ability of the original insurer to effect reinsurances. If the reinsurer proposes to restrict his liability as contended for by plaintiffs, it is inconsistent he should leave his responsibility entirely uncertain or contingent. In a litigation between an insurance company suing defendant on grounds similar to those urged here the insurance policies had the endorsement to apply to excess over fifty thousand dollars. The litigation failed because the limitation was held not to affect the defendant (*North America Insurance Company vs. Hibernia Insurance Company*, 140 U. S. 572). But the explicit statement of the policies of no liability, except for losses over the specific amount, is suggestive of the character of the reinsurances in this case on which no definite amount above which loss is to occur is found either in the negotiations or the applications. On the contrary the written contracts are unqualified reinsurances up to seven-teen thousand five hundred dollars, ten thousand dollars and fifteen thousand dollars. If that sort of indemnity contended for by plaintiff had been intended, it would seem it would have been explicitly stated in the negotiations and applications. There is no such testimony, and the written contracts are of an entirely different character.

We have examined the testimony relied on to show that these reinsurances were not "flat," but "excess" reinsurances accepted with reference to a "line" of original insurance taken out by the company seeking reinsurance. We find no evidence in the record which would justify us, in our opinion, in adopting plaintiff's contentions. We find no evidence which would warrant us in holding that these reinsurances were to cover losses on one of the risks only above thirty-five thousand dollars; on another above twenty thousand; on the other above thirty-five thousand dollars. On what part of the testimony, as to negotiations or applications, could contracts of that character be sustained? The testimony is indefinite; is based in part on impressions, and in some respects manifestly consists of deductions of the witnesses. The conclusions drawn from the testimony, in support of plaintiff's case, are directly opposed to the written contracts in which all discussion and negotiations usually end. The expressions attributed to defendant's agent, with slight variations, are "we carry our line;" "we offer the excess of our line," or others equivalent thereto. In everyre insurance not of the entire risk, the original insurer carries part of the risk and insures to the extent of the residue, which may be expressed as the excess of his line. The expressions attributed to defendant's agent, and from which plaintiffs deduce special contracts, simply announce, in our view, that which is implied in every reinsurance except the rare instance of reinsurance of the entire risk. When the original insurer does not reinsure for the full amount of the risk, in the event of a total loss he pays that part, but when the loss is not total, he goes on the reinsurer the object of all reinsurance. American and English Encyclopedia, *Verbo* Insurance.

The effect the plaintiff's argument gives to the expressions of defendant is a reinsurance operative only on loss over a fixed amount, *i. e.*, defendant's line. No such limitation is expressed and none is implied. It seems to us the expressions are perfectly consistent with the usual import of reinsurance, which is, that the insurer seeks indemnity not for loss over a certain amount, but for any and all loss up to a certain amount. The plaintiffs now exclude the insurer from indemnity except for loss over certain amounts. That is not usually the purpose of reinsurance. Of course the contract may be modified, but it is difficult to supply the modification from the fact the reinsurance uses language which might well be employed by any

one seeking the ordinary benefit of reinsurance. Reinsurance is indemnity to the insurer for the loss up to the amount, whether for the whole or part of the risk stipulated, and for which the premium is paid. It is a contract as put by the books by which the original insurer procures another to insure him against loss by reason of the original insurance. Again, it is a contract where the insurer, to lessen his own liability, reinsures or transfers the insurance he has agreed to carry, in whole or in part, to a new insurer, who, there-upon, occupies the same position as the original insurer does to the original insured, or still again: when the loss has happened the reinsurer must pay to the first insurer the amount of the loss within the policy. He must pay the entire sum reassured, and has no concern with any arrangement between the first insurer and his creditors. 3 Kent, Sec. 278, foot-note; Elliot on Insurance, Sec. 3; Biddle on Insurance, Sec. 7, 378. We think it clear from the record that the satisfaction now insisted on by plaintiffs under the contracts was not the indemnity the defendant sought. When defendant insured to cover loss over fixed amounts, as it seems was done in some of the companies, that kind of indemnity was stipulated in the policies. This answers, we think, the suggestion in the briefs, why a different form of indemnity was required from these companies. The contracts differed—the measure of indemnity accorded with the contracts. With these plaintiff companies the certificates were for unconditional reinsurances. With that appreciation, when the losses occurred the demands were for payment of the entire amount reinsured, as the contracts in our opinion required. Prompt compliance without question followed. The light thrown backward years after disclosed to plaintiffs (the petition alleges) that the companies paid in error; and this suit was brought to revoke the payments. With all possible allowance for the alleged ignorance of the facts connected with these losses the payments carry a significance the mind can not easily resist. A demand of payment on insurance intended only to cover loss up to a fixed amount would naturally suggest to the reinsurer, called on for payment, the inquiry of the amount of the total loss. If under these contracts the plaintiffs were bound for no loss under a certain amount it is difficult to conceive that payments would have been made without the rendition of an account or some investigation, or, at least, an inquiry of the total loss. But we fail to find that any account was rendered or

asked, or that there was any investigation or inquiry on the subject. The amounts of the reinsurance were paid in full, as we infer, on the simple notification of the losses. In the confidence of commercial intercourse, such payments might well be made under unqualified contracts of indemnity, but, in our view, would be entirely out of the ordinary course of the reinsurances as now contended for, called for no payment whatever, unless the loss exceeded the amount stipulated and to be deemed prominent in the mind of the reinsurer.

The claim of a payment in error naturally suggests how the error occurred. No false representations are suggested unless a call for payment is to be deemed fraudulent. The call affirmed the liability for the amount of the reinsurances. If there was only a qualified liability, as now contended for, an inquiry would have disclosed no obligation in one case, and in the other two, only for amounts below those claimed. But we are confronted with the fact that with no such inquiry or the faintest suggestion from plaintiffs, they paid the full amounts of the reinsurance, perfectly consistent with the idea of liability for loss up to the amount reinsured and repugnant, we think, to any other appreciation of their obligations.

In this case we are asked by the plaintiffs to displace the clearly defined liability arising from the ordinary contract of reinsurance. Instead of unqualified reinsurance of seventeen thousand five hundred dollars, ten thousand and fifteen thousand dollars, the plaintiffs' argument is the substitution of special contract only to cover losses over certain amounts which his argument adopts as those intended. On the reinsurance of ten thousand dollars the defendant is to have no indemnity for a loss of nineteen thousand dollars. On an other reinsurance of seventeen thousand five hundred dollars the plaintiffs are only to contribute to make good sixteen thousand dollars of a loss of over fifty thousand dollars, and in another case, with sixty-one thousand dollars of reinsurance, defendants are to bear the whole loss of forty-seven thousand dollars, except twelve thousand dollars. This construction strips defendant of all benefit in a reinsurance of ten thousand dollars and sensibly reduces the advantage proposed by premium paid by defendants for reinsurances of sixty-one thousand dollars and fifteen thousand dollars. This construction we are to adopt on the significance plaintiffs attach to expressions of defendants' agents and conversations from

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which plaintiffs deduce their appreciation of the contracts. Our examination leads us to the conclusion that the expressions of defendant's agent were consistent with the indemnity of the ordinary contract of reinsurance. We think the conduct of the parties accords with that contract. With statements and expressions relied on by plaintiffs for a significance to which we can not assent and opposed by plain written, qualified flat reinsurances, in our opinion, the certificates must stand as expressing the obligations of the plaintiffs, and in fulfilment of those obligations the plaintiffs made the payments now sought to be revoked.

For the reasons herein assigned the judgment appealed from is hereby affirmed.

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ACCOUNTS BETWEEN PARTNERS.

In the agreement between partners for the purchase in the West and sale in Europe of grain, the stipulation for the delivery here by the purchasing partner of the grain free on board, the other binding himself to provide the ships for the transportation of the grain is not inconsistent with the collateral agreement that the terminal charges here—i. e., storage with the incidental necessary inspection, insurance and interest while the grain is stored in elevators, shall be divided equally between the partners, all such charges having been foreseen as apt to arise and incurred owing to the inability to provide ships to take the grain as it arrived, of the partner assuming that obligation.

Interest charges in an account rendered and acquiesced in become part of the amount shown to be due on which subsequent interest may be charged. 12 An. 20; 4 An. 210; 39 An. 791.

The account rendered and acquiesced in is proof of the indebtedness it exhibits. 1 Greenleaf, Sec. 212; 3 Rob. 381; 12 An. 20; 39 An. 971.

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ACCOUNTS—HOMOLOGATION OF.

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An account of a receiver homologated without proof the judgment can not be maintained.

Saw Mill Manufacturing Company in Liquidation, p. 711.

ACTION EN DECLARATION DE SIMULATION.

Without resorting to the revocatory action the judgment creditor may contest the judgment of another against the common debtor, when the contested judgment is assailed as a simulation based on no consideration. C. C., Art. 1970; 2 An. 484; 11 An. 267; 2 Hennen's Digest, p. 1031, No. 1.

Hence, the prescription of one year applicable to the revocatory action furnishes no protection to the contested judgment. Civil Code, Art. 1994.

The judgment for an alleged loan and the judicial mortgage arising from the registry of the judgment will not avail against other judgment creditors, when there was no such loan at the date the judgment for the loan and of the judicial mortgage, although the loan had been promised and part furnished subsequent to such judgment; the article of the Code (3292) authorizing conventional mortgages to secure future engagements having no application to such a case.

Gladney vs. Sheriff et al., p. 316.

ACTS OF INCORPORATION.

Under Sec. 677, which requires that the incorporators "shall prepare and sign" an act, either in an authentic or private form, it is not essential that the incorporators should each and all be able to sign their names. 9 La. 521; 11 La. 251; 15 La. 43; 5 An. 43; 5 An. 685.

Board of Trustees vs. Campbell, p. 1543.

ADMINISTRATION—INVENTORY.

Where the deceased was in ordinary partnership, which was dissolved by his death, the final account of the executor ought to show the condition of the partnership as to its solvency, and the eventual interest, if any, of the succession in it. All property, of whatever kind and description, must be placed on the inventory.

The final account of an administrator or executor should be a full and complete exhibit of all the affairs of the deceased, leaving nothing for inference, and there should be nothing omitted which might possibly provoke further litigation, such as the leaving off the inventory and final account, a claim which may be collected after the discharge of their executors by the heirs.

Succession of Gardere, p. 289.

ADMINISTRATION—INVENTORY—Continued.

One who is not a creditor of a succession has no right to demand that the administrator of the same shall file an account of his administration.

Succession of Giddens, p. 856.

A claim against the administrator of a succession for property of which he is claimed to be in possession, belonging to another succession, should be urged in a suit for such property, not by opposition to the administrator's account.

Succession of Blancand, p. 578.

COMMUNITY PROPERTY.

The administrator of the succession of a deceased wife is without right or authority to take possession, or assume control of property held in community between the deceased and the surviving husband and usufructuary, or to sell the same for the purpose of paying debts of the community, notwithstanding they are debts which the community owes to the separate paraphernal estate of the wife.

Verrier vs. Sheriff, p. 717.

SUCCESSION.

Where executors have the administration of a succession composed entirely of stocks which have a market value, but fluctuate, and they sell the same at private sale in small lots for the interest of the succession, when a public sale would have had the effect of depreciating the value of the stock, by putting on the market large amounts at one time, they will not be held responsible for the loss in value estimated at the highest market quotations, when no demand has been made upon them by particular legatees, or the universal legatees, to pay the legacies, and for this purpose demand a public sale of the stocks by an order of court.

Succession of Kaiser, p. 937.

ADMINISTRATOR'S BOND.

Where a notary taking an inventory of the effects of a succession has failed to follow the requirements of Art. 1107 of the Civil Code that he should note the distinction between property

ADMINISTRATOR'S BOND—Continued.

which the deceased owned entirely, and that in which he simply had an interest, it can not be required in order to qualify as administrator of the succession that bond be furnished to an amount one-fourth beyond the estimated value of the effects belonging wholly to the deceased, and also to the estimated value (as fixed in the inventory) of the properties in their entirety which belong to commercial partnerships and joint stock companies in which he had an interest.

Article 1041 of the Civil Code, which provides that "as soon as the inventory or inventories of the succession are finished, the judge shall name an administrator to manage the property thereof and oblige him to give bond and sufficient security for the fidelity of his administration, unless the administrator prefer to furnish, instead of this security, a special mortgage on unincumbered property of a value sufficient to serve as a guarantee for his administration," justifies the exercise of judicial discretion in determining under some circumstances and to some extent the amount which an administrator should presently furnish as a guarantee for his administration, the amount so fixed being liable to be increased as changing conditions call for.

Succession of Levy, p. 1520.

ADOPTION—TUTORSHIP.

The tutor may adopt his ward, but he does not thereby acquire any right over the minor's estate that he did not have as tutor.

He can not lessen his responsibility, or that of the securities on his bond as tutor by becoming an adoptant.

Succession of Unforsake, p. 546.

AGREEMENTS—CONSTRUCTION OF.

Two agreements of contemporaneous date, one of which is signed by creditor and debtor, and the other by the debtor and surety, and each making reference to the other, must be construed together, and thus construed, what is doubtful in one may be made clear by what is found in the other.

An agreement to extend a line of credit for a certain amount, coupled with a stipulation for the payment of all goods purchased, binds a surety for a general balance of account.

Bush Wine and Liquor Company vs. Wolff et al., p. 918.

ALIMONY.

The rejection by a court of a wife's claim for alimony is unquestionably irreparable; if erroneous it could not be repaired unless through appeal.

In this State, applications for alimony rest upon the articles of the Civil Code and under the control of judicial discretion of the court. The law in this State relatively to alimony does not materially differ from that of other States.

When, at the time the wife's claim for alimony at one hundred dollars per month had been disposed of by the District Court, it amounted to a sum in excess of that required to give the Supreme Court jurisdiction, the appeal from a judgment fixing amount of alimony will not be dismissed.

Carroll vs. Carroll, p. 835.

Article 148, C. C., which provides that "the husband can not be compelled to pay * * * unless the wife proves that she has constantly resided in the house appointed by the judge," must be read (subject to exceptional cases) in connection with Art. 147, which declares that the wife shall prove her residence "as often as she may be required to do so." The law designs that the wife shall be subjected to the supervision of the court, but on this matter the court must be left some discretion and control.

If a husband object to the order fixing the domicile of the wife, he should proceed to have such order set aside directly, not collaterally.

The order of court which assigns a domicile to the wife pending her action for a separation should not be used to her disadvantage.

Id., p. 836.

See *Separation from Bed and Board*.

APPEAL.

If errors be committed in setting cases for trial, or irregularities arise in fixing the cases to be heard before the District Court, the question not being one over which the court has no jurisdiction, the writ of prohibition is not the proper remedy.

The case being appealable, the relators have an adequate remedy by appeal.

State ex rel. Shaw vs. Judge, p. 27.

APPEAL—Continued.

The party against whom judgment has been rendered can not appeal if he has acquiesced in the judgment.

This does not apply to the party in whose favor an obligation is admitted in a suit where the defendant made admissions without plaintiff's consent, and if there was a confession of judgment it was made without plaintiff's consent, and, therefore, does not affect the right to appeal from the judgment.

Hodges vs. Ory, p. 54.

A person seeking to obtain the reversal of the verdict of a jury and the judgment of a court on appeal should place matters before the Appellate Court in a shape such as to satisfy it that there has been injury as well as error.

State vs. Celestin, p. 272.

No appeal lies from a judgment for less than two thousand dollars (\$2000) amount of dues for wharfage, where there is no "contestation" made by the pleadings, as required by the Constitution.

The Supreme Court only has jurisdiction when either the constitutionality or legality of the law is at issue.

Town of Thibodaux vs. Constantin & Bragard, p. 338.

JUDGMENT OF SUPREME COURT ON.

A vendee of property having died leaving unpaid a portion of the price due by him, the vendor brought suit upon the resolatory condition to have the sale dissolved for the non-payment of the price, making defendants in the suit the widow administering the succession of the deceased as tutrix of their minor children, and individually as widow in community. Defendant, in her two capacities, answered, and a judgment was rendered setting aside the sale, and liquidating and adjusting the claims and counter claims of the parties. A creditor of the deceased appealed from the judgment contesting the right of the tutrix, as such, to represent the succession in the suit, and setting up various grounds for the reversal of the judgment itself. The Supreme Court held that the suit was properly brought against the tutrix, and, at the instance of the appellant, amended the judgment adversely to the plaintiff in some respects. A rehearing was applied for and refused.

APPEAL—Continued.

On the day the rehearing was refused an ordinary creditor of the succession gave bond under an order he had obtained for a devolutive appeal, had the record brought up a second time, and attempted to have the original judgment reversed or amended. Plaintiff pleaded *res judicata*, basing himself on the judgment rendered on the first appeal. The court dismissed the appeal, holding that the first appeal settled the law of the case; that the court having decided that tutrix as administering the succession was the proper defendant in the suit for a dissolution of the sale, she, in that suit, and on the first appeal, represented the mass of the creditors, and the second appellant, a mere ordinary creditor, was not entitled to an appeal to reopen the case upon the merits.

Vincent vs. Phillips, Tutrix, p. 351.

MOTION FOR.

Motion for an appeal must be filed in due time and an order of appeal entered by the court.

State vs. Ventura, p. 586.

Where a defendant breaks jail and is a fugitive from justice pending the appeal, the appeal will be dismissed, but when an accused, prior to the filing of his application for a rehearing on a judgment dismissing his appeal, returns to the custody of the sheriff and when such an accused has been sentenced to suffer death, the decree of court in doubtful cases should favor the liberty of the citizen and right of appeal and an appeal dismissed will under the circumstances be reinstated.

State vs. Thibodaux., p. 601.

HOMOLOGATION OF ACCOUNT.

An order of court approving and homologating, so far as not opposed, a tableau of distribution filed by the receiver of a corporation, is subject to be appealed from by a creditor of the corporation, even though he did not oppose the tableau in the District Court. The right of appeal is not cut off because other parties had filed oppositions covering all the items of the tableau.

Saw-mill Manufacturing Company in Liquidation, p. 711.

APPEAL—Continued.

The amount of the fund in the sheriff's hands, the subject of the judgment distributing it, is the test of the right of appeal, and not the amount of appellant's demand. Constitution, Art. 81; Amendment Acts 1882, p. 174; 40 An. 185; 34 An. 1140.

Murray vs. Sweeney, p. 760.

A motion to dismiss, on the ground of imperfections in the order and bond of appeal, must be filed within three judicial days after the transcript has been filed; but when the transcript shows that an amount is involved which is below the lower limit of our jurisdiction, it is our plain duty to dismiss the appeal *ex proprio motu*.

Naghten vs. His Wife, p. 799.

ACQUIESCENCE IN JUDGMENT.

When the subjects of a judgment are distinct, acquiescence in one will not defeat the appeal as the judgment on other and distinct demand.

Succession of Kaiser, p. 973.

The amount of the principal demand is the test of the right of appeal of the intervenor. 8 La. 167; 2 An. 189; 6 An. 12.

Lumber and Shingle Company vs. Hart, p. 1035.

The executor who is a legatee has the right to appeal from a judgment against him in his official capacity. He has the right also to appeal from a judgment ordering a distribution of the funds in a manner different from that exhibited by his account. Representing all the parties he has the right to appeal for the common benefit of all, as it is his duty to see that the funds are distributed among those whom the testator intended should be beneficiaries.

Succession of Allen, p. 1036.

On the appeal of the plaintiffs in the lower court, the defendants neither appealing or asking any amendment of the judgment in the mode pointed out by the Code, can obtain no change or reversal of the judgment of the lower court.

Salle et als. vs. Monasterio et als., p. 1282.

APPEAL—Continued.**BY INTERVENOR.**

The intervenor in a suit in which the plaintiff claims less than two thousand dollars, the intervenor's demand also being under our appellate jurisdiction, has no appeal to this court.

Lehman & Co. vs. Hart, p. 1277.

APPOINTMENT OF RECEIVER.

A suspensive appeal will lie from a judgment appointing a receiver to a corporation.

Banks et al. vs. Manufactory, p. 1383.

It is no cause for the dismissal of an appeal that a record has been omitted from the transcript which was not filed in evidence. It could form no part of the record, not having been filed.

Succession of Stuart, p. 1484.

The court again affirms that no grace is allowed on extensions of time to file records of appeal.

The right to dismiss the appeal not filed in time is not lost by the lapse of three days from the date of filing. The three days' rule has no application when the ground to dismiss is failure to file the record on the original or extended return day. 47 An. 1534.

Nor is such right at all affected by an order extending the return day made on the *ex-parte* application of the appellant after the return day has passed. 4 An. 350; 10 An. 76; 47 An. 1534.

Building and Loan Association vs. Church, p. 1458.

ASSESSMENTS.

Assessments against the property owner for the cost of the banquette or paving laid in front of his property under the provisions of the city charter are not taxes in the meaning of the articles of the Constitution, defining the jurisdiction of this court. Art. 81; 9 Rob. 333; 2 An. 380; 4 An. 1; 21 An. 51; 20 An. 499; Act No. 20 of 1882, Secs. 32, 33.

Fayssoux vs. Denis, p. 850.

When the requirements of the statute providing for notices to delinquent taxpayers are carried out, it would not follow that the notices were ineffectual because they did not reach the parties

ASSESSMENTS—Continued.

for whom intended. Citations properly made at domicile are well made, though not handed to the person intended to be served.

When property is assessed in the name of an "Estate of J. M. Hoyle," a notice addressed by the tax collector to the "Estate of J. M. Hoyle," placed and prepared in the postoffice, is not a compliance by the tax collector with the requirements of law.

Hoyle et al. vs. Southern Athletic Club, p. 879.

The supplemental assessment roll, provided by law to supply omissions or correct errors in the original roll, must be accompanied with notice to the property owner proposed to be bound by the supplemental assessment, but payment of the State taxes based on such assessment will preclude the owner from urging the want of such notice when called on to pay the city taxes levied on the same assessment. Acts 1888, No. 85, Sec. 11; Acts 1890, No. 106, Sec. 11.

The court again affirms that notice to the owner of the tax sale for taxes assessed since 1879, is indispensable to pass title, and a paper purporting to give such notice, left with one not the agent of the owners, is no notice. Constitution, Art. 210; Act No. 85 of 1888, Sec. 40 *et seq.*; 44 An. 912; 45 An. 1109; 46 An. 403.

Hodding vs. City, p. 982.

When property has been seized and sold in a suit to which the owner was not a party, and the purchaser sells the same to another, and it is assessed in the name of the latter and sold at tax sale, the assessment and sale are null and void.

It is not essential that property should be assessed in the name of one possessing both the equitable and legal title in order that the assessment may be legal and valid. But there must be a *prima facie* title to serve as the foundation of a valid tax sale. The evidence must be on record to show that the owner was divested apparently of title by proceedings against him.

Martin vs. Athletic Club, p. 1051.

Payment of debts secured by bond and mortgage of a date long anterior is not a running annual expense of the company; that under the terms of the statute it is not deductible from the gross

ASSESSMENTS—Continued.

annual earning of the year, to fix the net earning and the consequent value at the time of the franchise. Franchises are property (32 An. 915; Board of Liquidation vs. City of New Orleans; Railroad Company vs. Delamore, 34 An. 1228; New Orleans, Spanish Fort & Lake Railroad Company vs. Delamore and Another, 114 U. S. 505; City of New Orleans vs. Railroad Company, 40 An. 588; New Orleans City & Lake Railroad Company vs. City of New Orleans *et als.*, 44 An. 1055), and amounts applied from the gross receipts to the payment of property bought many years prior are taken account of in fixing net revenue.

The franchise was bought for cash; the amount needed to this end was borrowed at the time, and is now bonded and paid from year to year. These past liabilities are not annual expenses of operation, lessening annual revenue. The liability on property does not, in assessing, constitute an offset. Railroad Company vs. Assessors, 1156.

It is not essential for a valid assessment of property on the tax rolls that it should follow exactly the deed of the property to the tax debtor. It is a sufficient assessment if it conforms to it and identifies the property.

Chopin vs. Pollet, p. 1186.

See Tax Sales.

ATTACHMENT.

A statement of assets and liabilities by the defendant to one who was his creditor, in order to obtain advances, made some time prior to the date of plaintiff's claim, is not ground sufficient for an attachment.

A breach of contract and failure to forward all the cotton promised will not under all circumstances justify an attachment.

Winter vs. Davis, p. 260.

ATTORNEY.

Even when the contract for compensation for the professional services of the attorney is not enforced, he will be entitled to recover from his client sums expended for his benefit by the attorney.

Hodges vs. Ory, p. 54.

AUCTIONEERS—FEES—ADVERTISEMENTS.

Under Sec. 18, Act. No. 40 of 1877, there is but one single "*first insertion*" in a judicial advertisement; all others following the "*first*" are "*subsequent insertions.*" The doctrine of "*alternate first insertions,*" by making the advertisements non-consecutive and charging each first insertion of a renewed advertisement as an "*alternate first insertion*" is not sustained by law.

The fees of an auctioneer are regulated by R. S., Sec. 160. When property is sold by order of court to effect a partition the fee of one per cent. on all sums under twenty-five hundred dollars, and one-half of one per cent. on all sums over that amount.

Succession of Van Hoven, p. 620.

BILLS OF EXCEPTION—CRIMINAL PROCEEDINGS.

The Supreme Court will not consider bills of exception unless signed by the judge before whom the case was tried.

When counsel for defendant present bills of exception to the judge for his signature and the judge refuses, it is the duty of counsel to except to such refusal. Unless this is done, this court will decline to review the action of the judge in refusing his signature.

State vs. Calkins, p. 1283.

BILLS OF LADING—CONNECTING CARRIERS.

A stipulation in a bill of lading, for the transportation of cotton in bales, by steamboat and a railroad as a connecting carrier for hire, that neither shall be responsible for damage which shall be occasioned by fire, does not exonerate either from responsibility from such damage as shall result from fire that is occasioned through the fault or ordinary negligence of the agents, servants or employees of the carrier.

Notwithstanding such a stipulation in a contract of affreightment, the carrier is bound to use due care and watchfulness in the protection and safe delivery of the goods of the shipper.

If the care demanded was not exercised the case is one of negligence, and a legal liability is made out when failure is shown.

Maxwell & Putnam vs. R. R. Co., p. 385.

BOARD OF REVIEWERS—ASSESSMENTS.

The powers of the Board of Reviewers, created by Secs. 22 and 23 of Act No. 106 of 1890, are *quasi-judicial* in character and must be exercised in the manner indicated by law.

In the matter of the correction of the assessments of individual citizens or corporations, the Board of Reviewers is authorized to take action only upon a special opposition made by the party alleging himself to be aggrieved, and for the purposes of such a contest before the board a sworn declaration of the taxpayer, such as is required by Sec. 10 of Act No. 106 of 1890, is essentially necessary. *Ex rel. Johnson vs. Tax Collector*, 39 An. 538.

The declaration of the court in *Insurance Co. vs. Board of Assessors*, 40 An., p. 373, which announces another rule of construction, does not meet with the approval of this court.

An assessor called on by the Board of Reviewers to revise his rolls, has the right to call in question the fact whether the board in making alterations therein had acted under the circumstances which the law required to exist as conditions of its taking action, though he be not authorized to dispute their conclusions of facts when acting within their statutory jurisdiction.

When powers conferred by statute have not been exercised, under the circumstances and requirements of the statute, the acts done fail for want of authority, even though they would have been right and sustained, had legal conditions as to action been complied with.

Oil Co. vs. Assessor et al., p. 1351.

BONDS.

See Sureties on Official Bonds.

BUILDING CONTRACT.

Where a contract for a fixed amount is entered into between the owner of property and builder, according to certain specifications to which a plan is annexed as explanatory thereof, no charge in the absence of an agreement to that effect can be made as for extra services in the preparation of the plan. The builder appears in the transaction, not as an architect, but as a contractor.

A builder claiming remuneration over and above the contract price of a building for certain labor and material, as having been

BUILDING CONTRACT—*Continued.*

furnished for extra work, must establish with reasonable certainty that they were used for that particular purpose.

Maas vs. Succession of Hernandez and Executrix et als., p. 284.

BUILDING—REPAIR OF; LIABILITY OF OWNER.

Every one is bound to keep his buildings in repair, so that neither their fall nor that of any part of the materials composing them may injure the neighbors or passengers under penalty of all losses and damages which may result from the neglect of the owner in that respect. The owner of the building can not free himself from this primary obligation by leaving to an insurance company, which, carrying a policy on the building, had elected, after a fire, to make repairs upon it, to determine the necessity of and the extent of repairs. He can not, as between himself and the public, shift responsibility from himself to the insurance company. The insurance contract may fix and determine the rights and obligations of the parties thereto, but it is not a measure for the rights of the public, nor a criterion by which to test the liability of the owner to it.

Steppe vs. Alter et al., p. 863.

CERTIORARI.

The writ of *certiorari*, authorized to afford relief against "void" proceedings of the lower court to the prejudice of the suitor, will be refused to restrain the alleged illegal action of the constable in executing the writ of *feri facias*, the Code pointing out the methods of relief by application to the lower court, and there having been no such application by relator. Code of Practice, Arts. 857 *et seq.*, 853, 1141, 1145.

State ex rel. Publishing Co. vs. Judge and Constable, p. 1380.

The court has no power, under the writ of *certiorari*, to review the judgment of the lower court sustaining the plea of domicile; the writ can not be substituted for an appeal. Constitution, Art. 90; C. P., Arts. 855 *et seq.*; 41 An. 180; 42 An. 1090; 43 An. 177.

State ex rel. Brackenridge Lumber Company vs. Justice, p. 1532.

Writs of prohibition and *certiorari* will not issue when the proceedings of the lower court sought to be reviewed and arrested are ended.

Ex rel. Railroad Company vs. Judges, p. 1166.

CERTIORARI—Continued.

The writ of *certiorari*, issued under the supervisory jurisdiction of the Supreme Court, can not be employed for the purpose of inquiring into the correctness of a judgment, when the forms of law have been followed.

Its only province is to pronounce upon the validity of a judicial proceeding.

State ex rel. Express Company Agent, vs. Justice, p. 1249.

CITIZENSHIP OF JUDGE.

The contention that the judge of the lower court does not possess the qualification of citizenship can not be considered on an application for a *certiorari* to review the sentence or judgment of such judge. Constitution, Art. 90; C. P., Arts. 855, 857.

State ex rel. Kiernan vs. Recorder, p. 1375.

CERTIORARI AND MANDAMUS.

The respondent judge having granted an order of appeal in favor of the defendant, returnable to this court within ten days, from a decree disallowing a change of venue: Held, that *certiorari* is not the proper mode of testing the legality of such order.

That writ can not be employed as a substitute for a motion to dismiss an appeal.

The order and proper course to be pursued is to await action in this court on the appeal.

Miller, J., concurring.—The relator, alleging that the accused is allowed no appeal from interlocutory orders, asks for writs of *certiorari* and *mandamus* to set aside an appeal granted the accused from the judgment refusing him a change of venue, the appeal being returnable in ten days now on the point of expiration; with the prompt and complete remedy of the motion to dismiss the appeal available to the relator, there is, in my opinion, neither warrant nor necessity in this case to substitute for that well defined remedy the exercise of our supervisory jurisdiction. Constitution, Arts. 81, 90; *State vs. Hornsby*, 8 Rob. 362.

Nicholls, C. J.; Breaux, J., dissenting.

State ex rel. District Attorney vs. Judge, p. 787.

CERTIORARI AND PROHIBITION.

In an appealable case the writ of prohibition is not the remedy.

CERTIORARI AND PROHIBITION—Continued.

The writ of *certiorari* (not in aid of appellate jurisdiction) is not the remedy to have reviewed appealable issues.

The functions of the two writs are not enlarged when combined in one application for their issuance.

State ex rel. Keplinger and Enderlee vs. Justice, p. 1348.

The writs of *certiorari* and prohibition to correct the error of an order of the District Judge will not issue when, since the application to this court, the order has become inoperative.

State ex rel. District Attorney vs. Judge, p. 474.

CESSIO BONORUM—CORPORATIONS.

The *cessio bonorum* of a corporation can be brought about neither by an application for the same on its own behalf nor by creditors acting adversely to it under and through a respite improvidently granted to it. The provisions of the laws relative to voluntary surrender and to respite refer to natural persons. corporations can not avail themselves of them.

Lumber Company, Ltd., vs. Creditors, p. 269.

CHILDREN.

Legitimate children may fall under the provisions of the law relative to forced heirship. The law divides children into three distinct classes, legitimate, illegitimate and legitimated. Legitimate children are those who are born during the marriage; illegitimate children those born out of marriage. Illegitimate children may be "legitimated" in certain cases in the manner prescribed by law, but illegitimate children are not by "legitimation" transformed into "legitimate" children. Legitimated children take "the right of legitimate children" only by force of affirmative provisions of law to that effect. By Art. 199 of the Civil Code children legitimated by a subsequent marriage of the parents have the same rights as if they were born during marriage. This special exceptional privilege throws legitimation resulting from any other cause outside of the purview of the law-maker under the rule *affirmatio unius est exclusio alterius*.

Marionneaux vs. Dupuy, Executor, p. 496.

CITATION—TO CORPORATION.

A citation addressed to the president of a railroad corporation is an absolute nullity, and a binding and valid judgment can not be founded thereon. It should have been directed to the railroad company.

State ex rel. Railroad Co. vs. Justice, p. 1417.

CITIZENS BANK.

When the Citizens Bank subjects property to its ownership, which was mortgaged to secure stock subscriptions, the property is not exempt from taxation as part of the capital stock of the bank.

State ex rel. Citizens Bank vs. Board of Assessors, p. 35.

CIVIL DISTRICT COURT—CRIMINAL STATUTES.

The civil district courts in this State have no authority to restrain the execution of a criminal statute.

A court which has no jurisdiction of a cause, exceeds the bounds of its authority when it issues therein an injunction. It has no power to entertain a rule for contempt for the violation of such an injunction.

State ex rel. City vs. Judge, p. 1448.

COMMERCIAL AGENCIES—DAMAGES.

The business of commercial agencies is lawful and beneficial to commerce.

Their publications issued to subscribers generally are not privileged communications.

If their reports, issued on printed lists and generally distributed among their subscribers, are erroneous and thereby occasion damages, they may be held liable.

As relates to an erroneous report, negligence of one injured, by which the injury is aggravated, will not bar him from recovering damages for so much of the injury suffered prior to the negligence.

The supposed libel was not actionable *per se*, but only in respect to the special damage claimed and shown.

Giacona vs. Bradstreet, p. 1191.

COMMERCIAL PARTNERS.

Suit having been instituted against the two individuals who compose a commercial partnership in process of liquidation, the prayer

COMMERCIAL PARTNERS—Continued.

being for a judgment against them *in solido*, and the evidence disclosing that the plaintiff had rendered services only for the exclusive benefit of one of the members, who was unable to give the business his time and attention, the other should be exonerated from liability therefor.

In such case the expenditures made by the firm, or from the assets thereof, in partial or complete settlement of said claim, may go into the partnership settlement when made *inter se*.

Hake vs. Hake et al., p. 373.

See Accounts.

COMMUNITY OF ACQUETS OR GAINS—INTEREST OF HEIRS.

Until there has been a sale, or something that is equivalent, of real property of a community, the interest of the heirs of deceased remains, and the survivor is without power, by any convention of his own, to make a full title to another.

Probate proceedings, contradictorily taken between the heirs of the deceased wife and the surviving husband, to ascertain the value of the heir's net interest in the community property, and to fix the basis of the usufructuary's bond, can not operate as a substitute for a sale of their interest therein.

Abes vs. Levy, p. 40.

When the community is dissolved by the death of one of the spouses, the survivors and the heirs are each seized of one undivided half interest in the community property, subject to the rights and privileges of the community creditors. This interest can be mortgaged or sold, and is therefore subject to seizure by a judgment creditor of the heir or of the surviving spouse.

Succession of Giddens, p. 356.

The widow who takes possession of movables of the community, exercises her legal usufruct, and such property being consumable by use, and actually used by her, her liability to heir of the husband is for one-half the value of the property, subject to the reduction of the community debts. R. S., Sec. 629; C. C. 534, 549.

The law does not recognize the fiction that the community movables, in this case groceries long since consumed, are to be deemed

COMMUNITY OF ACQUETS OR GAINS—INTEREST OF HEIRS—

Continued.

still in existence, represented by other groceries bought by the widow in the course of her business, and inventoried at her death as property applicable to pay her debts.

A claim against the administrator of a succession for property, of which he is claimed to be in possession, belonging to another succession, should be urged in a suit for such property, not by opposition to the administrator's account. 6 Martin, 27; 15 An. 228; 41 An. 504.

Succession of Blancand, p. 578.

The presumption is that property bought during the community belongs to the community, and is the common property of the husband and wife.

The declaration in a deed of purchase that the property was bought with the separate paraphernal funds of the wife is not sufficient in itself to prove title.

This presumption, the court holds, may be rebutted, the truth of the declaration shown, and the title of the wife established.

Bartels vs. Souchon, p. 788.

RIGHTS OF MINORS AND SURVIVING PARENT.

The court again affirms that community creditors are entitled to be paid from the community property, and that this right can not be impaired by the mortgage on such property executed by the husband after the death of his wife. Civil Code, Arts. 2402, 2406, 2409; Newman vs. Cooper, 46 An. 1485; Germain vs. Gay, 9 La. 584; Ware *et al.* vs. Jones, Sr., 19 An. 430; Palmer Dickson *et al.* vs. H. P. Dickson *et als.*, 37 An. 915, and authorities there cited.

The Code indicates the mode of enforcing such mortgage.

If in a contest between the father's creditors and his children, claiming also to be his creditors, he can be required in the adjustment of his account with them to charge for their board, maintenance and education, no such charge can be admitted if the children had revenues derived by the father or under his control applicable to their support. Mercier vs. Canonge, 12 Rob. 385.

COMMUNITY OF ACQUETS OR GAINS—Continued.

The father, except under exceptional conditions not existing in this case, can not bind his minor children for debts arising for his individual contracts. C. C., Art. 350; *Urquhart vs. Scott*, 12 An. 674; *Payne vs. Scott*, 14 An. 778; *A. Miltenberger vs. J. P. Elam, Tutor, et als.*, 11 An. 687.

Newman vs. Cooper et als., p. 1206.

CONFLICTING PATENTS TO PUBLIC LANDS.

It appearing from the evidence *dehors* two or more conflicting patents, which were issued by the Register of the State Land Office, for the same land, to different parties, at different dates, that those last issued were predicated upon prior locations made under internal improvement certificates in due form of law, and those first issued were not founded upon sufficient proofs, the last in date of issuance will reflect the paramount title.

Broussard et als. vs. Pharr et als., p. 230.

CONSTITUTIONAL LAW—MARINE INSURANCE.

Act No. 66 of 1894 does not violate the provisions of the State and Federal Constitutions.

It is within the power of the State to forbid a citizen of the State doing any act in the State which violates the laws of the State.

If a party while in the State takes out an open policy in a marine insurance company domiciled out of the State and which has not complied with the laws of the State for doing business within its territory, covering property situated within the State, he is liable to the penalty imposed by Act 66 of 1894.

The mailing of a letter or telegraphing a communication by which instantly each shipment of goods is insured and the risk attached is doing an act in this State to effect insurance and comes within the act forbidden by the statute.

State vs. Allgeyer & Co., p. 104.

MUNICIPAL CORPORATIONS.

The proviso to Art. 209 of the Constitution gives no authority to municipal corporations to levy a tax for school purposes.

CONSTITUTIONAL LAW—*Continued.*

The General Assembly, under the Art. 46 of the Constitution, is prohibited from conferring upon any one corporation the privilege to assess a local tax for school purposes.

Act 110 of 1880 confers no power upon municipal corporations to amend their charters, so as to incorporate in it any right or privilege not previously granted by the Legislature.

Nelson et als. vs. Mayor and Selectmen of Homer, p. 258.

CONSTITUTION—SCHOOLS.

Paragraph 4, Sec. 8 of Act No. 136, 1894, is null and void, being in conflict with constitutional amendment proposed by joint resolution 110 of 1890, and Act 36 of the same session, enacted to carry out the provisions of the amendment.

The amendment gave the Legislature authority to dispose of the surplus of the one per cent. tax allowed by said amendment, and Act 36 having disposed of a part of it for the support and maintenance of the public schools of New Orleans, it became a vested right in the Board of School Directors, which can not be disturbed by subsequent legislation.

Fisher vs. School Directors, p. 1077.

CONSIGNMENT AND CONSIGNEE.

It would be an extreme case which would justify a refusal by a consignee to receive freight when notified.

It is the duty of the consignee to receive the consignment and test the liability of the carrier for damages, if any had been sustained.

Corso & Co. vs. Railroad Co., p. 1286.

CONTEMPT OF COURT—CAN NOT ENFORCE WRIT OF FI. FA. BY PROCESS OF.

The relator, a debtor, against whom a judgment for money had been rendered, had a key of an iron safe in his possession containing property, the judgment creditor had pointed out for seizure. The former was ordered to produce the key and open the safe. After he had refused to comply with the order he was committed to jail for contempt.

CONTEMPT OF COURT—CAN NOT ENFORCE WRIT OF FI. FA. BY
PROCESS OF—*Continued.*

Held—There was a method for enforcing the writ of *fi. fa.* (C. P. 762) other than by process for contempt.

The order committing relator to prison for contempt is declared void.

State ex rel. Anglade vs. Judge, p. 1414.

CONTEST OF ELECTIONS HELD FOR IMPOSITION OF LOCAL
TAX.

The petition of taxpayers charging substantially that the proposed tax in aid of a railroad was defeated at the election held to authorize the tax; that votes cast against the tax were not counted; that the promulgated result was not in accordance with the facts, but is based upon the illegal rejection by the returning officer of such votes against the tax, and praying that promulgation of such result be adjudged void, and the returns of the returning officer be set aside with the prayer for general relief, will be deemed a petition of taxpayers, authorized by law, contesting such election. Constitution, Art. 242; Act No. 106 of 1892.

The taxpayers, plaintiffs in such suit, contesting the election, may join the demands that the election be set aside and that the ordinance of the police jury be annulled—levying the tax—for if the tax is defeated, there is no warrant for the tax.

Ibid.

Our jurisprudence affirms the jurisdiction of the courts in a class of cases without reference to the money demand of the litigant, and this case falls within that class. 19 La. 567; 45 An. 637, 681; 46 An. 278; Constitution, Art. 11.

In the suit of the taxpayers contesting the election to authorize a tax under Art. 242 of the Constitution, the amount in dispute is the tax on the property of the parish; an amount undoubtedly sufficient to give jurisdiction to the District Court, as well as this court on appeal, and the suit substantially involving the legality of the tax, this court on that ground besides, has jurisdiction of the appeal. 39 An. 107; 45 An. 682; 43 An. 95; 45 An. 681; Constitution, Arts. 11 and 81; 36 An. 328, 812; 39 An. 946; 37 An. 507.

CONTEST OF ELECTIONS HELD FOR IMPOSITION OF LOCAL TAX—Continued.

Taxpayers, non-residents and residents in the parish, may join in such suit. Constitution, Art. 242; Act No. 35 of 1886, Sec. 5; 39 An. 107; Cooley on Taxation, 765; 101 U. S. 601.

Sentell vs. Police Jury, p. 96.

In a petition to contest an election to authorize a tax the prayer that the returns be set aside, the promulgated result be decreed a nullity, that the returning officer be directed to make a correct compilation of votes, and that the ordinance levying the tax based on such return be decreed a nullity, all tend to the same relief and are not cumulative of distinct demands.

Such suit is required to be directed against the police jury, and the allegation that the returning officer rejected or changed returns of commissioners, in violation of law, furnishes no ground for the exception on non-joinder, because the returning officer is not made a defendant. Act No. 106 of 1892.

Id. 97.

CONTRACT FOR LABOR AND MATERIALS.

Where a demand exceeds five hundred dollars for labor and materials in building addition to, and making repairs on house, there must be a written contract as against third persons, registered in the clerk's office in time.

If the property be sold without separate appraisalment. the privilege is lost.

Murray vs. Sweeney, p. 760.

CONTRACT TO FURNISH MONEY—ATTACHMENT.

A party having entered into a contract to furnish to another, at stated periods within a specified time, a given sum of money for the purpose of enabling the latter to purchase for the former cotton seed, the former has a right to look to them for the reimbursement of his outlay, as well as to rely upon them to recruit and operate his business.

In case the latter shall decline to carry his contract to completion, and threaten to dispose of the seed he has purchased in pursuance of his agreement, because the former declines to pay his drafts after he has already overdrawn his contract, this act

CONTRACT TO FURNISH MONEY—ATTACHMENT—Continued.

comes within the purview of the law applicable to fraudulent intent as justifying an attachment.

Oil Company vs. Matheson, p. 1821.

CORPORATIONS—FOREIGN.

Unless with some exception of the law, a foreign corporation can be sued only at its domicile, declared in accordance with the Constitution and laws; suits for licenses, claimed by the State or parish, are not within any such exception. Constitution, Art. 286; Act No. 149 of 1894; Act No. 150 of 1890, Sec. 7.

State ex rel. Sheriff vs. Western Union Telegraph Company, p. 81.

DAMAGES EX DELICTO.

Article 165, C. P., 9th par., refers to damages resulting from positive acts; to acts of commission, and not those resulting from those of omission. 30 An. 608; 33 An. 955; 36 An. 188; 39 An. 796; 40 An. 754; 46 An. 276.

The condition of jurisprudence in this State shows that whenever a corporation in our courts has been compelled to submit to being sued outside of the place of its domicile, the actions were for damages *ex delicto*, and that even in an action *ex delicto* for damages, the plaintiff then is required to have recourse to the court of the domicile where the corporation has only passively contributed to the injury in failing to do something incumbent upon it to have done.

In cases of personal injuries received by an employee in the course of his employment, when the party injured has died and an action has been brought for damages under the Acts of 1855 and 1884, the action has to be brought as a tort. The contract of employment, under such circumstances, will not be counted on in fixing the character of the action. Suit in the parish where the damage was done, *held* proper.

Castille and Wife vs. Refinery and R. R. Co., Ltd., p. 322.

SUITS AGAINST OFFICERS OF.

Indirect allegations that the officers of a corporation against whom suit has been brought "had failed in their duty in certain respects," and "had not taken due precautions to ascertain the

CORPORATIONS—*Continued.*

fitness of an employee before placing him in charge of dangerous machinery," are insufficient to charge such officers with liability, when it is not alleged what part, if any, said officers were called on to take in the premises within the scope of the duty imposed upon them by virtue of their office, and wherein they had failed in the performance of such duty.

Henry vs. Lumber Co., p. 950.

Where a corporation is created under a general statute which requires that it should be incorporated as a corporation "limited," the limitation must so appear in the act of incorporation, otherwise the private interests of those who signed the act, and were its directors, will become responsible under the terms of the statute.

Lehman & Co. vs. Knapp, p. 1148.

Chambers & Roy vs. Knapp, p. 1156.

AS COMMERCIAL PARTNERS.

A corporation may, as to its legal existence, be entirely legal and protect its shareholders fully to construct and operate a railroad and to engage in planting under laws preceding the Act of 1888, and yet the shareholders are responsible personally for carrying on a commercial partnership.

Lehman & Co. vs. Knapp, p. 1148.

ESTOPPEL.

Merchants who sell goods for merchandising to a corporation do not thereby preclude themselves from holding the shareholders personally bound after ascertaining that, as to their mercantile transactions, they are responsible as commercial partners.

A motion to vacate the appointment of a receiver was not an estoppel of record.

Lehman & Co. vs. Knapp, p. 1148.

COSTS—FOLLOW JUDGMENT.

Costs are due to the one who recovers judgment.

Bartels vs. Souchon, p. 783.

CRIMINAL LAW—ATTENDANCE OF WITNESSES.

An accused person is entitled to compulsory process to force the attendance of his witnesses, but where after having been duly subpoenaed some of them failed to appear, he has not, by reason of that fact, an absolute right to have the trial of the case postponed or continued until after they should have been attached. The court has the right, before postponing or continuing the case, to be informed as to the materiality, relevancy or necessity of the testimony, which would be sought to be elicited through them.

State vs. Celestin, p. 272.

In this State it is an indictable act to propose to receive a bribe by any parochial or municipal officer.

Letters from an officer to his employer communicating facts bearing upon the issue before the court, relating to the employer's interest, being an incident of the business and contemporaneous, are admissible as part of the *res gestæ*.

A contradicted witness may be corroborated (as to some matter material to the issue); although the one against whom he testified declared that in introducing contradicting evidence it was not the intention to impute fraud, fabrication, or in any manner to impeach him, the fact was that the repeated contradictions were of an impeaching character.

One "has the unquestioned right to introduce evidence in corroboration of a witness who has been impeached or *contradicted*."

State vs. Haley & Caufield, p. 73.

As a matter of law, the prosecuting officer has the right to press upon the jury any view of the case arising out of the evidence—the Supreme Court is bound to credit jurors with common intelligence, conscientiousness and sense of duty. To justify setting aside a verdict of a jury, approved by the trial judge, on the ground of intemperate or improper remarks made by a District Attorney, this court would have to be thoroughly convinced that the jury was influenced by such remarks, and as well, that the remarks contributed to the verdict found.

State vs. Johnson & Butler, p. 87.

If the record fails to show that the defendant was present during the trial, the record may be amended so as to supply the omission.

CRIMINAL LAW—Continued.

Evidence which is irrelevant and admitted without objection can not be corroborated by the testimony of another witness when objected to.

State vs. Monceaux, p. 101.

Sections 784 and 785 of the Revised Statutes declare that whoever shall commit the crime of wilful murder on conviction thereof shall suffer death. There shall be no crime known under the name of murder in the second degree, but on trial for murder the jury may find the person guilty of manslaughter. In the consideration of a homicide the grand jury is not forced to enter into the particulars of the killing and primarily charge manslaughter, but is authorized to charge murder under Sec. 1038 of the Revised Statutes, leaving the result of the charge to be determined by the facts elicited by the testimony.

The request of the accused to have the court charge the jury as to the logical character of the indictment found against him was properly overruled as a matter not to be submitted to it.

If a party with intent to kill or murder a particular person illegally and feloniously shoots at him (his will being directed exclusively to that end), but he fails to accomplish his purpose and unintentionally kills another person, he has no reason to complain if under an indictment for murder he is found guilty of manslaughter, because he may not have reason to expect that his shot would strike a third person.

The Supreme Court can not be asked to reverse the verdict of a jury because the court below failed to charge the jury on the law of self-defence when it has nothing before it to show that under the evidence in the case such a charge would have been relevant and the court was not asked to charge on that subject.

Counsel who fails to ask the court to charge the jury on the subject of self-defence, because, in an unofficial conversation with the judge the latter had stated to him that the plea of self-defence admitted the killing, can not, after the trial, seek a reversal on the ground that he had been forced by this statement to waive his right of going before the jury on that issue. He should not have acquiesced in the matter, but have insisted upon his legal right to a special charge and availed himself by exception and bill of any error made by the court in modifying or qualifying his requested charge.

CRIMINAL LAW—Continued.

The Supreme Court is not authorized, in criminal cases, to pass upon the issues involved on a mere statement as to occurrences which took place on the trial when the statement was made after the occurrences took place and without exceptions having been taken and bills reserved, even though the District Judge may sign the same.

State vs. Salter, p. 198.

WITNESS.

The ruling of the trial judge in allowing certain questions to be answered which are objected to as leading will not be disturbed, unless it is shown that under the circumstances under which they were asked they were leading.

A witness, who is asked a single question, may be, on cross-examination, asked all such questions which are legitimately calculated to test his memory, accuracy and veracity, with reference to the single fact sworn to.

The recommendation of the jury who tried the case for a new trial is no legal reason why it should be granted.

State vs. Fontenot, p. 220.

A witness having been impeached by evidence of declarations inconsistent with his testimony can be corroborated by evidence of other declarations corresponding with his testimony made prior to impeaching statement.

The dangerous character of a third person, present at the homicide, who made no demonstration against the deceased, and had no difficulty with him, is not admissible in evidence.

As a general rule, the questions put to a witness must call for his knowledge of some fact; they must not, save in special cases, be framed to elicit the impressions or opinions of a witness.

It is not error on the part of the court to refuse to give an instruction which had already, in substance, been given in the general charge to the jury.

State vs. Fontenot, p. 283.

GRAND JURY.

A member of the grand jury can not be permitted to impeach its finding, by testifying he, as a witness before that body to sup-

CRIMINAL LAW—Continued.

port the indictment, was not sworn. 1 Bishop, Secs. 874, 878; 1 Wharton's Criminal Law, Sec. 509; 38 An. 680.

State vs. Comeau, p. 249.

INDICTMENT.

The objection of an accused that the property he was convicted of stealing was imperfectly and incompletely described in the indictment should be taken by demurrer or a motion to quash the indictment before the jury is sworn. It is too late to urge such an objection, as being one apparent on the face of the indictment, on a motion in arrest of judgment.

State vs. Thomas, 30 An., p. 800.

Revised Statutes, Sec. 1064.

State vs. Polite Jim, p. 267.

ATTORNEY TO REPRESENT STATE.

There is nothing illegal in the appointment of the attorney to represent the State, under the statute of 1886. The signature to the indictment as acting "District Attorney" was not an irregularity vitiating the indictment.

State vs. Fontenot, p. 288.

An information framed in the language of Art. 852, Revised Statutes, charges an offence under the laws of the State. The offence of entering a dwelling with the intent to kill and the stabbing of a person therein, with intent to kill, may be prosecuted in one indictment.

It is not necessary, under the Sec. 854 of the Revised Statutes, to charge that the person stabbed was lawfully in said house.

The closing of the information "contrary to the form of the statute," etc., applies to each count, and it is not necessary to insert these words after the several counts.

Formal defects in an indictment, and duplicity alleged therein, are cured by verdict.

District judges are authorized to order special jury terms at which both civil and criminal cases can be tried.

State vs. Scott, p. 293.

CRIMINAL LAW—Continued.**RES GESTÆ.**

Acts and declarations of participants in a transaction constitute parts of the *res gestæ*, and proof of same is admissible.

Testimony tending to show that the deceased had suspected the accused of stealing his wood, and had been watching him, to the knowledge of the accused, is admissible for the purpose of showing motive in committing the homicide.

It is not competent for the accused to prove, as an element of defence, that his conduct had been exemplary during his incarceration in jail. Such testimony exclusively appertains to the sentence.

The peaceable character of the defendant can not be established by witnesses who have not resided in his neighborhood for seven and eleven years.

Previous threats of the deceased can not be introduced as the basis of proof of his bad and dangerous character, when the testimony discloses that the accused was the aggressor in the homicidal affray.

State vs. Eugene Fontenot, p. 305.

JURORS.

That a jury was ordered and summoned to attend at a civil term of the District Court in one of the parishes of the State, whereat the grand jury who found the indictment against the defendant, and the petit jury who tried and convicted him, were selected and organized, is not ground for new trial or arrest of judgment.

State vs. Dickerson, p. 308.

THREATS, WITNESSES.

On an indictment for murder, threats of violence against the deceased by the accused are admissible to show malice on his part. 1 Bishop Crim. Law, 1110; 34 An. 1012; 36 An. 859.

On the cross-examination of witnesses to prove the good character of the accused for peace and quietness, they may be asked if they had not heard particular acts of violence imputed to the accused. Reputation is derived from what people generally say of the party whose character is the subject of investigation, and the witness testifying to the good he has heard of the party may

CRIMINAL LAW—*Continued.*

be asked on the cross-examination if he has not also heard evil conduct attributed to the party. 3 Rice on Ev., p. 604, Sec. 376; 1 Taylor, Sec. 352; 2 Starke, 304.

The wife is not a competent witness for or against the husband in the criminal prosecution against him. The Article 2281 and Acts of the Legislature Nos. 29 and 59 of 1886 and 1888, applying only to testimony in civil cases, have no purpose to affect the rule excluding the wife as a witness for or against the husband in criminal prosecutions; the only exceptions in such proceedings are when from necessity the wife testifies to crimes in respect to her person, and the other, limited exceptions have no pertinence here. 1 Greenl., Sec. 343.

State vs. Pain, p. 311.

NEW TRIAL.

An application for a new trial of the accused, convicted of murder, supported by his affidavit that he has learned, since the conviction, of witnesses who will testify to his innocence; that the offence was committed by another, and that if allowed until the succeeding day he will produce the witnesses or their affidavit, affords a basis for the allowance of the brief delay asked and should have been afforded the accused. *State vs. Hyland*, 36 An. 87.

State vs. Armstrong, p. 314.

JURORS.

The Court adverts to the trust reposed by the law in the jury commissioners, and affirms the judicial function to afford relief when in the composition of the array of jurors the right of the accused to a fair trial is infringed.

The members of an association to aid in the prosecution of a particular class of offences, and those in sympathy with the association and who contribute money for the purposes of the organization, are not competent jurors to try an indictment for the offence of the class, to prosecute which the association is founded and the money subscribed. 4 Gray, 18; 47 An. 193.

State vs. Moore, p. 380.

CRIMINAL LAW—*Continued.*

In order that a confession may be proven it is not necessary to repeat the words. It is enough if the substance of the confession be given.

On the trial for the burglarious entry with intent to kill, evidence that the defendant shot the prosecuting witness, while in the act of committing the crime charged, is admissible as part of the *res gestæ*.

In case of alleged burglary the impulsive utterances of a member of the family, in the presence of the accused, and while he is in the act of committing the crime charged, as part of the *res gestæ*, is evidence.

State vs. Desroches, p. 428.

If before the jury has been completely impaneled, one of the jurors, who has been accepted and sworn, is taken ill and can not serve, it is no ground of complaint that the court should have excused him, called an additional juror and sent the case to trial.

The State has the right on cross-examination of defendant's witnesses to cross-examine them in respect to their relations with the accused in order to affect the weight and credibility of their evidence, and this, though the examination may cover matters not touched on by the witnesses in their direct examination. 33 An. 538, *State vs. Willingham*; *Ibid.*, page 737, *State vs. Gregory*.

State vs. Johnson, p. 437.

A simple remark, made by the judge to defendant's counsel, during the progress of the trial, that he seemed "to want no testimony except what suits his side of the case;" and that he propounded to him the question: "Are you afraid of your witness?" do not amount to a comment upon the testimony, nor the intimation of an opinion in reference to the testimony.

The trial judge is not in duty bound to give any special instruction to a jury which is not applicable to the proven facts in the case; and, in the absence of proof disclosing that two defendants are husband and wife, it would have been improper and misleading to the jury for the judge to have given them instructions with regard to the exercise of coercion and marital influence.

CRIMINAL LAW—Continued.

Motions for new trials should contain all the grounds which defendants rely upon to have verdicts set aside. The filing and overruling of one exhausts the right.

Had the requested instruction been given the trial judge would have assumed that the defendants were husband and wife.

The trial judge denies that there was any evidence of that fact.

It was a question of fact for the jury, and the trial judge properly declined to assume that there was a marriage.

If it be granted that the accused were husband and wife, the doctrine of presumed coercion does not apply in cases of murder.

State vs. Barnes et al., p. 460.

CONTRADICTORY STATEMENTS.

The court applies the rule excluding proof of contradictory statements of a witness, unless his attention has been first directed to the statements and the opportunity for explanation thus afforded him. 1 Greenleaf on Ev., Sec. 462.

Such statements, the required basis for the proof of them previously supplied, are admissible to impeach the credit of the witness; if the statements are sought to be put in evidence for any other purpose they are inadmissible because hearsay.

State vs. Delaneville, p. 502.

State vs. Fontenot, p. 288.

DYING DECLARATIONS.

A complete foundation has been laid for the introduction of dying declarations in evidence by making proof that the attending physician had told the deceased that his wounds were dangerous; that the deceased had stated that he was going to die; that at the time of making his statement his extremities were cold, and shortly afterward he died.

The evidence objected to as *new* evidence not in rebuttal not being before us, we must accept the trial judge's statement that it was not, and sustain his rulings conformably thereto.

State vs. Baker Smith, p. 533.

The disqualification of a juror can not be taken advantage of in a motion in arrest of judgment.

CRIMINAL LAW—Continued.

The Supreme Court will not interfere with the rulings of the trial judge relating to the argument and conduct of counsel in the trial of cases.

The trial judge instructs the jury as to the law applicable to the case, and if an erroneous statement of the law has been made by counsel, it can be corrected, and the law applicable to the case given in his charge by the trial judge. If he fails to do so, the party complaining has his remedy by asking for special instructions, and if refused, the reserving of a bill.

State vs. Chevis, p. 575.

The offences of assaulting by shooting, or with intent to commit the crime enumerated in the statute when embraced in one act, may be charged conjunctively in one count. Wharton's Criminal Law, Sec. 390; 34 An. 529; 35 An. 458; 87 An. 768.

State vs. Romus, p. 581.

Section 8381, Revised Statutes, which requires a prosecution in the name of the State against a delinquent road overseer, contains the essential description of a crime or offence, and a road overseer, indicted under said section, is an incompetent grand juror. The qualifications of both grand and petit jurors are fixed in Sec. 1 of Act 89 of 1894.

Where the defendants do an unlawful act, such as the wrecking of a train, with felonious intent, and death ensues, in order to convict the defendants of murder it is not required that they should be primarily convicted of train wrecking. It is competent to prove the wrecking of the train by the defendants, not only as the means which occasioned the death, but to establish the degree of defendants' guilt.

Statements of one of two defendants, charged with the commission of the same offence, are admissible evidence, although they implicate the other, in whose presence they were not made, if such statements are restricted to the party making them, and the part relating to the other defendant is stricken out.

State vs. Thibodaux, p. 600.

In an indictment for larceny from unknown owners it is competent for the prosecution to prove that the property found in possession of the defendant did not belong to him.

CRIMINAL LAW—*Continued.*

On the trial for stealing hogs from unknown owners it is proper to show that the ear marks on the ears found in defendant's possession was not defendant's mark.

It is competent to ask the defendant, who is a witness on his own behalf, if he is charged with other offences, and whether there are other bills pending against him. The inquiry into a witness' credibility is always permitted. *State vs. Murphy*, 45 An. 958.

State vs. Southern, p. 629.

The court is not bound to assign counsel to accused unless upon his own request, and if he fails to make the request or to apply for a continuance on the ground of absence of counsel of record, but is ready for trial, the mere fact that the trial proceeded without the aid of counsel does not constitute error nor a ground upon which to base a demand for a new trial. 25 An. 381; 38 An. 979; 37 An. 606; 39 An. 19.

Declarations made by a defendant's counsel in a motion for a trial that accused had a good defence is a mere conclusion. Facts should be set out by which the court could determine the correctness of the conclusion that the accused could have been relieved from the disadvantages referred to by the assistance of counsel.

State vs. Perry, p. 651.

In an indictment for perjury the use of the word "feloniously" is not necessary to describe the offence. If the indictment charges the offence in the statutory description it is sufficient. Corrupt, wilful and false swearing to an affidavit for a continuance is embraced within Sec. 857, R. S.

The word "feloniously" is essential in indictments only when it is used in the statute describing the offence, or where the statute refers to the common law offence only by name, and its use was essential in an indictment. But where a common law offence is referred to, and it is preceded by a statutory description, an indictment following the statutory description is sufficient.

State vs. Mallock, p. 663.

CRIMINAL LAW—*Continued.*

PRESCRIPTION.

Act 50 of 1894, amending Revised Statutes, Sec. 968, declares that prescription shall not apply to any conviction of a lesser crime or offence under an indictment for wilful murder, arson, robbery, forgery or counterfeiting; but, on the contrary, said prescription or exception shall not be pleadable against such an offence.

It was the evident intention of the Legislature that this statute should go into operation and have effect at once, and that thereafter such exception should not be pleadable at all.

State vs. Bell, p. 735.

SURETY ON BOND.

The surety on an appearance bond is not released from liability because of the inexact language in the bond describing the offence, least of all when it contains the condition the accused will not depart the court without leave. 13 An. 268; 40 An. 722.

State vs. Arledge, p. 774.

CONTRADICTIONARY STATEMENTS.

The rule that statements of the witness out of court contradictory to his testimony can not be proved unless he is first afforded the opportunity of denial, admission or explanation, is enforced whether the imputed contradictions are offered to impeach the credit of the witness or to show his malice to the accused. 1 Greenleaf on Evidence, Secs. 475, 476, 477; Starkie on Evidence, S. P. 239, 240.

If the witness admits the contradictory statements the accused can offer no proof of the contradictions thus admitted, although such proof is proposed to be given to show the falsity of the explanations of the witness why he made the statements contradictory to his testimony. Wharton's Criminal Evidence, Sec. 483; Rapalge, Law of Witnesses, Sec. 204.

Although a defence witness has been cross-examined and dismissed without being questioned as to contradictory statements out of court imputed to him, and although other defence witnesses have been cross-examined and dismissed, yet the State, not

CRIMINAL LAW—Continued.

having commenced rebutting, may be permitted to recall and examine the defence witness to lay the basis for contradicting him and to prove such contradictory statements; it appearing by the bill that the District Attorney learned of the statements after the cross-examination of the witness, the recall operating no delay and causing no denial of any right of the accused. 8 Rob. 562; 29 An. 716; 38 An. 932; 47 An. 836.

State vs. Goodbier, p. 770.

When a bill of exception leaves this court uninformed as to the grounds upon which the motion complained of was overruled, matters are left just where the ruling of the judge left them.

On an indictment (Act No. 8, 1870, Ex. Sess., Sec. 8) for "shoot-
ing at any dwelling house, school house, church house or out-
house, any person or persons being lawfully therein," it is not
necessary to set out in the indictment the names of the person
or persons alleged to have been lawfully in the house.

State vs. Campbell, p. 781.

Kindred offences, generic in kind, growing out of the same transac-
tion, may be charged in the same indictment, provided they be
incorporated in separate counts.

The State does not waive the right to peremptorily challenge a juror
after he has been examined and turned over to the defence. It
is within the discretion of the trial judge to allow a peremptory
challenge after the juror has been sworn.

It is sufficient in an indictment, to negative prescription, to aver that
the crime was never made known to any officer of the State of
Louisiana qualified and authorized to direct a prosecution.

State vs. Wren & Harville, p. 803.

CHANGE OF VENUE.

The judgment refusing the change of venue applied for by the ac-
cused is not appealable apart from the appeal from the sentence
accorded him by the Constitution and laws. Constitution, Art.
81; R. S. 1081.

State vs. Hart, p. 1008.

CRIMINAL LAW—Continued.

An information founded upon the Revised Statutes, Sec. 791, which charges that the defendant did feloniously, wilfully and maliciously cut a person named with a dangerous weapon, with intent to commit murder, is good and sufficient in law.

State vs. Washington, p. 1361.

WARRANT OF ARREST.

The warrant of arrest is sufficient authority not to order the release of the prisoner.

The District Court in whose jurisdiction it is charged a crime was committed has cognizance of the case.

State on the relation of Rhodes, p. 1363.

The defendant having been indicted for the larceny of a skiff, and the proof showing that he was found in possession of the property apparently stolen recently, it was competent for him, as a witness in his own behalf, to negative the existence of felonious intent by stating that he had taken the skiff for the purpose of evading arrest under a warrant for robbery, and had carried with him a friend by whom it was to be returned to the owner.

Such testimony is perfectly competent and admissible. It is for the jury to determine what weight such evidence is entitled to, as well as the credibility of the witness.

State vs. Dillon, p. 1365.

A party may be charged in separate counts in the same indictment with burglary and larceny.

State vs. Huey, p. 1382.

On the trial of a party accused charged "with shooting with intent to murder" it is sufficient for the court to charge that it devolved upon the State to prove beyond reasonable doubt that the shooting was done wilfully, maliciously and with malice aforethought.

Under such a charge it would be impossible for a jury to bring in a verdict of conviction unless the condition of the evidence was such as would forcedly beyond a reasonable doubt, exclude the hypothesis of the shooting having been accidental.

State vs. Allen, p. 1387.

CRIMINAL LAW—*Continued.*

An instruction which, enumerating a certain evidential state of facts, closes by instructing the jury that if they found such a state of facts to have been established beyond a reasonable doubt, the jury must find the accused "guilty," if allowable, is exceedingly dangerous.

State vs. Lima, p. 1202.

INSANITY.

Where a party has been indicted and his counsel suggests his insanity before trial, and a commission is appointed to inquire into his mental condition and reports him to be insane, and the jury returns a verdict accordingly, and the judge of the Criminal District Court remands him to the parish prison, without a commitment to the insane asylum, the judge of the Civil District Court has authority, under Sec. 1768, R. S., to inquire into the facts and circumstances of the case, and if, in his opinion, he is dangerous to the citizens and the peace of the State, to commit him to the insane asylum of the State.

State ex rel. Kennedy vs. Sheriff, p. 1280.

A refusal to allow a peremptory challenge will not avail a defendant when it is not claimed that in consequence of the judge's ruling defendant has been compelled to accept an obnoxious juror. 88 An. 480.

An exception to the charge of the judge, that it was calculated to injure the party accused, is entirely too general and sweeping. The judge properly refused to charge the jury on abstract questions of law.

State vs. Tibbs, et al. p. 1279.

DYING DECLARATION.

A declaration made by a person *in articulo mortis*, reduced to writing by his attending physician, signed by the declarant, and his signature attested by a justice of the peace, is admissible in evidence as a dying declaration, the only objection being that having been thus written, it was not in proper form, and, therefore, incompetent and inadmissible as secondary and hearsay testimony.

State vs. Parham, p. 1809.

CRIMINAL LAW—Continued.

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State vs. Allen, p. 1367.

CRIMINAL LAW—Continued.

In criminal cases where there is no bill of exception, nor assignment of errors, and there is no error patent upon the face of the record—the judgment of the District Court will be affirmed. *State vs. Behan*, 20 An. 386; *State vs. Kreppt*, 20 An. 402.

State vs. Davis et al., p. 1388.

The court affirms the rule that the statement of observers, not participants in the act, the subject of investigation, are not admissible as *res gestæ*. Wharton's Criminal Evidence, Secs. 262, 263; 39 An. 472; 42 An. 996.

State vs. Ramsey, p. 1407.

Confession.—The hope of immunity (no promise of immunity having been made) is not such inducement as to make the confession inadmissible.

Conspiracy.—The proper foundation having been laid and the conspiracy sufficiently established, the act done by one in furtherance of the unlawful design, is, in law, the act of all, and the declaration of one of the accused, at the time of doing such act, is evidence against the others.

Charge of the Court.—Although it is made the duty of the court to instruct the jury not to base any presumption against the accused upon the ground that he has not chosen to testify; the defendant, may, in effect, waive the instruction.

Jurors on Voir Dire.—The information furnished to the District Attorney about the fairness and responsibility of certain jurors was not attended with circumstances of impropriety.

Name of the Deceased.—The proceedings were regular and the rulings correct, except in one particular—the principal was not informed by the indictment for the murder of what person he is accused, and the accessories before the fact are charged with having feloniously counseled and procured the homicide of a person not named or identified.

State vs. Griffin et al., p. 1409.

CONTRADICTORY STATEMENTS.

A witness having testified that the accused was about to return the property to the owner; in order to answer the charge brought against the accused, by proving that he did not intend to steal the property.

CRIMINAL LAW—Continued.

The circumstances of the alleged prior statement was first placed before the witness, with sufficient clearness, to identify the occasion referred to.

Held: that for the purpose of throwing discredit on the testimony of the witness, the question of the prosecuting officer was proper to show that she had on a former occasion made statements inconsistent with the evidence she had given.

State vs. Scott, p. 1419.

VENIRE.

A motion to quash a *venire* must be filed on the first day of the term at which the indictment is found, or exceptional circumstances shown which rendered compliance with the rule of law impracticable.

The object of this rule is to speed the administration of justice, and it must be rigidly enforced, except in cases of great urgency, and when enforcement would operate injuriously to the defendant.

State vs. Collins, p. 1454.

Substantially, the law of self-defence, as given by the court in its general charge, covered the principle of law involved in the request made in behalf of the defendant for special instructions to the jury on the subject of self-defence.

It was, therefore, not error to decline to give the special instructions.

Where there was no testimony to prove the character of the deceased, the court could not be required to instruct the jury as to weight to be given to character, as the instructions would have had no relevancy to the evidence in the case.

The jury was properly instructed in so far as relates to a provocation by an antecedent wrong committed, which may have been felt by the accused.

The omission in defining the crime charged, which the judge was not requested to supply, is not error.

As relates to the character of the accused and the error urged to the charge in that particular, the following rule applies:

Where there is no bill of exceptions or assignment of error the judgment will be affirmed.

State vs. Scorsoni, p. 1464.

CRIMINAL LAW—*Continued.*

SCRUPLES OF A JUROR AGAINST CAPITAL PUNISHMENT.

The court may on the motion of the prosecution stand the juror aside when he has a fixed opinion against capital punishment. But the defendant can not challenge him upon that ground, particularly if the juror himself does not ask to be excused from serving. The challenge was properly denied by the court.

THREATS.

In order to be admissible as evidence a threat should indicate an intention to take the life of the one threatened.

CHARACTER OF THE DECEASED.

The foundation was not laid to admit testimony to prove the character of the deceased by proving that an assault was about to be committed, and that the assailed standing his ground killed his assailant, although not in peril of life or exposed to suffer great bodily harm.

State vs. Compagnet, p. 1470.

It is sufficient that an indictment framed under the provisions of a statute denouncing a statutory offence should charge a violation thereof in the identical language of the statute, or that of similar import.

An indictment charging in one count the malicious altering of the mark or brand of one hog, and in another count the larceny of one hog, is sufficient in law.

An indictment charging in one count the malicious altering of the mark or brand of a hog, the property of a certain person named, and in another count the larceny of a hog, the property of the same person named, does not necessarily denounce two contemporaneous acts forming parts of the same transaction, so as to render two distinct and separate sentences thereunder null and void. Being two distinct offences of the same generic characters same were pleadable in one and the same indictment in two separate counts.

State vs. Stelly, p. 1478.

CRIMINAL LAW—Continued.

The appointment of a jury commission and the drawing of a jury by it under a law which has not been promulgated are illegal, null and void.

State vs. Bruno, p. 1481.

While to sustain a conviction for larceny it should be proven that the goods and chattels alleged to have been stolen were feloniously stolen, taken and carried away, the indictment is not fatally defective if the word "away" is omitted and the meaning is supplied by other words.

The words "feloniously steal, take and carry" mean the felonious taking and carrying away the personal goods of another.

State vs. Parry, p. 1483.

There is no occasion for the reduction of testimony to writing when the evidence against the accused has been rejected and disallowed as incompetent and inadmissible.

It is not the duty of the clerk of court to reduce to writing special charges which the counsel of defendant desires the trial judge to give to the jury, for the purpose of settling a difference between the judge and counsel as to what were the precise terms of the alleged special charge.

State vs. Wright, p. 1488.

The Act No. 113 of 1896, which provides "for the manner in which bills of exception shall be taken in the trial of criminal cases," requires that the "statement of facts" which in case of appeal is to be attached to the "bill of exception" is to be made under orders of Court and is not to be made out by the clerk of his own motion or simply at the instance of counsel.

A bill of exception taken by a defendant to the ruling of the judge should be written up and submitted to the District Attorney and to the judge for examination and signature, the opportunity should be afforded the court of ascertaining whether the statements of the bill presented for signature are correct and for such statement and explanation by the Court as to it may seem necessary.

It is the duty of the court to give its charge in writing, if requested. It would be a practice not to be tolerated, that counsel failing to make such request should be permitted to make through the

CRIMINAL LAW—Continued.

clerk an *ex-parte* statement as to what the judge charged and as to what objection he urged to the same as it was so declared to have been given.

State vs. Laborde, p. 1491.

The discharge by the court of a grand juror not qualified to serve affords the accused no cause of complaint; the disqualified juror not participating in finding the indictment against the accused.

State vs. Brooks, p. 1519.

JURORS.

When a juror after he has heard the case and retires, but before going into the jury room, declares that he will convict or acquit the accused, in other words, that he will speedily agree on a verdict, without reference to the merits of the case, the verdict will be set aside.

State vs. White, p. 1440.

State vs. Shelby, p. 1518.

GRAND JURY.

If a grand jury is impaneled on the first day of the term, and on the second day it is discovered that one of the jurors is disqualified, it is competent for the court to discharge him, and order an additional grand juror to be drawn from the list of the grand jury furnished by the jury commissioners for that term.

State vs. Riez, p. 1446.

State vs. Meaux, p. 1517.

Not only error but injury must be alleged and shown to justify the reversal of a judgment. *State vs. Kennon, 45 An. 1195.*

Affirmative showing should be made in the Supreme Court to enable it to see for itself whether the testimony admitted and declared to be irrelevant would be likely to produce injury and to enable it to say in point of fact it was irrelevant.

In a criminal case it is improper to ask a witness if an offer had not been made to compromise the case. The rule in civil matters is applicable in criminal matters—i. e., that mere proposals for a compromise, or negotiating to effect one, are not generally admissible, though evidence may be given of any fact or distinct

CRIMINAL LAW—Continued.

liability admitted in the proposals, negotiations or conversations, the party sought to be affected being entitled to the benefit of the whole conversation or proposal. This court again affirms that "when there is a difference between the judge and the counsel as to the circumstances connected with the bill of exceptions the statements of the former are to be taken as true." *State vs. Underwood*, 44 An. 582.

In preparing bills of exception the prosecuting officer and the counsel for the accused should each make recitals of what the facts testified to were, and not deal in sweeping declarations on the one hand that the cross-examination was clearly within the limitation of the law, and on the other hand that it was not. The court, standing thoroughly impartial between the State and the prisoner, should make its own recital of the testimony and not send cases up resting for decision upon mere conclusions of its own on that subject.

State vs. Wright, p. 1525.

An indictment for rape is defective that does not charge the felonious intent accompanying the act: The qualification merely of the assault as felonious will not suffice. 42 An. 82; 6 An. 328; 33 An. 1288.

The conviction for the lesser offence is not supported by an indictment which neither charges the greater offence, nor embraces the constituents of that of inferior grades. R. S., Sec. 1053; 29 An. 601; 38 An. 387; 20 An. 145.

State vs. Porter, p. 1539.

In order to show that a witness had made statements out of court different from those made by him on the stand, he must be previously cross-examined as to such alleged statements. Such statements must be shown by a bill of exceptions to be material to the question at issue—the one made out of court must be shown to have been inconsistent with some fact stated by the witness in his testimony. *Rapalje on Witnesses*, Secs. 203, 205; *State vs. Johnson*, 35 An. 371.

"No provocation by words only, however opprobrious, will mitigate an intentional killing so as to reduce the killing from murder to manslaughter."

State vs. Conerly, p. 1561.

CRIMINAL LAW—Continued.

Where an indictment furnished a legal basis for a conviction upon it, the correction of a manifestly erroneous date by amendment may be permitted when time is not of the essence of the crime charged. *State vs. Pierre*, 39 An. 915; R. S. 1047.

State vs. Hamilton, p. 1566.

See Civil District Court.

See *Habeas Corpus*.

See Prescription.

COURTS—JURISDICTION.

Relator having been sued in the Second City Court of the city of New Orleans for the sum of twenty five dollars, as the amount of a call of 10 per cent. upon five shares of the capital stock of a corporation, and having answered that he was not the holder of said shares of stock, and consequently did not owe the amount demanded of him, and upon that ground excepted to the original jurisdiction of the respondent's court. *Held*, that if relator shall make good this defence it would be a good reason why judgment on the merits should go in his favor, but not that the jurisdiction of respondent should be defeated.

Ex rel. Knoop vs. Judge, p. 1027.

DAMAGES—CONTRIBUTORY NEGLIGENCE.

It is a recognized rule that before attempting to cross the track of an electric car a person should look to ascertain whether prudently the crossing should be attempted. The rule contemplates that this should be done at a time and place when the reason upon which it is founded could be made effective. When the law requires steps of diligence and caution it will not be satisfied by the substitution therefor of vain and useless acts.

Snider vs. R. R. Co., p. 1.

BREACH OF DUTY.

In a suit for damages for personal injuries received from a collision with the car of an electric car company, proof that the company may have failed in its duty in the employment of a particular motorman, or in furnishing to a particular car its proper equip-

DAMAGES—Continued.

ment, is not sufficient for a plaintiff to recover. The proof must show that the accident was caused by reason of these particular breaches of duty. 42 An. 1158; 44 An. 694.

Snider vs. R. R. Co., p. 1.

MALICIOUS SUIT—ADVICE OF COUNSEL.

Public policy favors the resort to the courts for the redress of grievances the litigant conceives to exist, and hence the law will not amerce him in damages unless his suit is malicious, as it is not readily imputed when one acts under the advice of counsel. Constitution, Art. 11; 13 La. 440; 28 An. 592; 46 An. 1842.

Fish vs. Egan, Jr., et al., p. 60.

CONSERVATORY WRITS.

As held in previous decisions, plaintiff seeking damages for seizure of his property under conservatory writs illegally issued will be restricted as to counsel fees, to the fee for dissolving the writ. 2 La. 620; 5 An. 714; 13 An. 40.

Fish vs. Egan, Jr., et al., p. 60.

A boy of fourteen years, being employed in a tinware factory to operate a small foot machine used for the purpose of punching eyes in small tin cans that were being manufactured by machinery, who voluntarily leaves his place of business, and goes away to another part of the establishment for the purpose of adjusting a belt connecting one of the machines of the factory with the line of the main shaft, and while thus employed receives serious and fatal injuries of which he dies, his parents can not recover damages of the corporation.

Daly vs. Manufacturing Company, p. 214.

TRESPASS BY JOINT OWNERS.

Joint owners of a saw-mill plant, having tortiously and wrongfully entered upon the partnership premises on a Sunday when the other joint proprietor was absent and removed therefrom certain important parts of the machinery essential to the operation of the mill, and carried them away, for the expressed purpose of preventing the latter from operating the mill, and kept them away for more than a month, during which time the mill was idle.

DAMAGES—Continued.

Held: That the co-proprietor, who has thus had his rights invaded and prevented from operating the plant, is entitled to actual and punitive damages commensurate with the loss and injury.

Ball vs. Levin & Co., p. 359.

PASSENGERS ON STREET CARS.

Ordinarily, passengers on street cars are expected to alight with some haste.

When, however, a person is infirm, or clumsy, or incumbered with packages or other hindrances, more prudence is required than ordinarily.

The questions were whether the passenger was on the steps alighting from the car and thrown to the ground by too hastily putting the car in motion, or whether the passenger was, after having alighted, rushing back to get a forgotten basket. In the former she has right to damages; in the latter case, she would not have.

The testimony is conflicting. The jury and the District Judge, who saw and heard the witnesses, decided that the weight of the testimony was with plaintiff, and that the passenger was alighting from the car at the time of the accident. The court finds no reason to disturb the verdict.

The damages fixed are not too large, and therefore the court will not reduce the amount.

Boikens vs. Railroad Co., p. 831.

Mental distress, in itself, is not one of the consequences arising from the raising of a fence on a division line.

Wolf vs. Stewart, p. 1432.

A member of a surprise party visiting the house of a friend for the purpose of spending an evening in social amusement, sustaining injury by means of a falling gallery.

Held: That she can not recover damages of the owner of the building, who had leased it as a place of residence to the friend whose house the party visited.

Revised Civil Code, Arts. 2322 and 670, must be construed together as laws *in pari materia*; and being thus construed they exclusively relate to the injuries which may be inflicted by falling walls, or

DAMAGES—Continued.

materials composing them, upon neighbors or passers by, and not to those resulting to occupants of the buildings, or guests therein assembled.

McConnell vs. Lemley, p. 1433.

Prechter vs. Lemley, p. 1439.

Where a lessor claims a specific amount in damages by reason of his property having been fraudulently sold by his lessee to a fraudulent purchaser, the action is one *ex delicto*. C. C. 2324.

Seelig vs. Dumas, p. 1495.

Whether possession of the property be still with the defendant fraudulent purchaser or not, such purchaser having frustrated plaintiff in the legal exercise of his rights. will not be permitted to turn the plaintiff round to a tedious and possibly fruitless pursuit and search for the property, and to litigation with persons who may have acquired it from the defendant. *Thornton vs. Mansker*, 10 La. 127.

Id., p. 1496.

See Corporations.

See Master and Servant.

DATION EN PAIEMENT—DELIVERY.

In the *dation en paiement* as in the contract of sale, when the vendor acknowledges whether expressly or by implication the purchaser's title and holds under and for the purchaser, the delivery by the vendor to the purchaser is to be deemed accomplished. Civil Code, Arts. 2439, 2455, 2556.

Joubert, Tutor, et als. vs. Quillier, p. 244.

An attack upon a *dation en paiement* from a husband to his wife made by a plaintiff on the ground that it was in fraud of his rights as a forced heir of the vendor and an absolute nullity, because a disguised donation, fails where the price paid was actually due by the husband to the wife, and it was not out of all proportion to the value of the thing sold, saving to the heirs of the contracting parties their rights, if there existed any indirect advantage. C. C. 2446, 2464.

Though an acknowledgment of indebtedness to his wife, made by a husband in an act of *dation en paiement* to her, is not conclusive

DATION EN PAIEMENT—Continued.

upon his forced heirs, attacking as such the act as a disguised donation, executed in fraud of his *legitime*, yet some effect must be given to it in connection with the other evidence in the case in determining the reality of the indebtedness when plaintiff in the suit declares that he accepts unconditionally the succession of his father.

Leleu et al. vs. Dooley, p. 508.

Transfers of property by the father to his daughter designed to provide for the indebtedness arising from his tutorship or other causes, and intended also as an advance on the eventual rights of the daughter in the succession of the father, can not be deemed sales, though in that form, because there is no price paid and no sales intended. Civil Code, Art. 2489; 12 An. 529; 5 Martin, 693.

In the *dation en paiement* the amount of the debt must be fixed; the transfers in this case are not *dations*, because there was no such intention nor adjustment of the debt. Civil Code, Art. 2655; 10 La. 151.

Transfers of such character are, in legal effect, donations, though dictated in part by the desire to provide for some indebtedness, and the acts will avail for the real object, *i. e.* as donations. Civil Code, Arts. 1536, 1586, 1900, *et seq.*; 5 Martin, 693; 12 An. 529.

Lamotte vs. Lamotte, p. 572.

DEATH BY WRONGFUL ACT.

In an action for damages for a death by wrongful act, failure of the plaintiff to connect by proper testimony all the necessary facts and circumstances will not justify the Supreme Court in supplying such testimony by inferences.

Gannon vs. Railroad Company, p. 1002.

DEBTOR AND CREDITOR—AGREEMENT BETWEEN.

Creditor and debtor having by written agreement established between themselves the relations of factor and customer, and definitely agreed upon the amount of credit which should be given by the former, and the manner in which the latter should discharge the same by the consignment, and proceeds of sale of products, other and subsequent creditors of the common debtor are without right to complain.

DEBTOR AND CREDITOR—Continued.

If, upon ascertaining that the original amount agreed upon was an insufficient basis, and that additional advances of money were necessary to maintain the debtor's business, the original agreement be supplemented, the advances thereunder made will be protected by subsequent shipments, and the proceeds thereof can be rightfully and legally imputed and applied thereto.

In case the debtor and creditor enter into a written contract of pledge, and another of mortgage, of contemporaneous date, securing the same obligations, same must be construed as being component parts of one engagement, so that the whole may have effect.

Phillips vs. Cotton Oil Company, p. 404.

DECREE—RECOGNIZING WIFE AS HEIR AND PUTTING HER IN POSSESSION AT END OF THREE YEARS. EFFECT OF.

The decree recognizing the widow as heir of the husband, and placing her in possession, did not, at the end of three years (O. O., Arts. 931, 932), definitely fix her status as such, and bar the rights of the real heirs of the husband to a recovery of his succession as against the wife and her succession.

When property is inventoried as belonging to the deceased wife, held by her under such a decree, is offered on proceedings invoked by her executor at public auction and adjudicated, the purchaser at such sale may object to accept title, and show that the deceased husband left collateral heirs surviving him, and then living; in such a proceeding the question at issue is the ownership of the property sought to be forced upon the purchaser, an objection more formidable than mere regularity of proceedings.

Succession of Nast, p. 1578.

DEDICATION TO PUBLIC USE.

A vendor in selling different portions of his property to others, may impress upon it by private contract, rights analogous to the public rights of highway, and yet those rights confined to the owners and representatives of the land forming the subject of the compact. The mere fact that an alley opens upon a public street does not make it a public alley.

A plain and positive intention to dedicate to public use is an essential element of a dedication, and that intention must be shown

DEDICATION TO PUBLIC USE—Continued.

by acts or language so clear as to exclude any other reasonable hypothesis, or at least to clearly convince the judicial mind. C. C., Art. 753; 37 An. 285; 41 An. 867.

A private way with no portion lying upon a public street, and a mere appurtenance of the lots abutting upon it, does not fall under the operation of Sec. 37 of Act No. 20 of 1882, relative to paving.

De Grilleau et al. vs. Frawley et al., p. 184.

DISTRICT ATTORNEY—NOLLE PROSEQUI.

Under the laws and jurisprudence of the State of Louisiana the District Attorney for the parish of Orleans has not the right to enter a *nolle prosequi* in a criminal proceeding, after the conviction of the accused is completed by the final disposition of all declinatory and intermediate pleas and motions, and the pardoning power of the Governor has become operative.

There are three stages in a criminal prosecution, viz. :

The inauguration or preliminary stage, where the indictment is absolutely under the control of the prosecuting officer.

The trial of the cause, and its incidents, during which the court has control, and the power of the prosecuting officer is suspended.

The period between the verdict of the jury and the sentence by the court, when the pardoning power supervenes.

State ex rel. District Attorney vs. Judge, p. 109.

RIGHT TO EMPLOY COUNSEL.

The District Attorney may appear for the State in a criminal prosecution, on the part of the State, before the committing magistrate.

He may, also, if he is employed in the discharge of other duties, secure counsel to appear in his stead before the committing court in which the preliminary examination is held.

State ex rel. Dist. Atty. vs. Recorder, p. 1369.

DOMICILE.

While the exercise of the right of suffrage in this State has its influence in solving the question of domicile of a party, it is not conclusive, and in the determination of such question the nature of

DOMICILE—Continued.

the domicile the party is supposed to have here, the purpose that brought him to the State, the time he spends here and elsewhere, where his wife and family are, his declarations and conduct, must all be considered in ascertaining his domicile. Succession of Franklin, 7 An. 395.

Hewes et al. vs. Baxter, p. 1308.

DONATION—ACTION TO REDUCE.

Of a suit having for its object to reduce an excessive donation *mortis causa*, so that plaintiff may realize out of the fund obtained, a judgment for less than one hundred dollars he owns against one of the heirs of the testator, this court has no appellate jurisdiction. Such a suit is revocatory in character, and the amount sought to be realized from the *res*, or sought to be subjected thereto, governs the jurisdiction, and not the *legitime* of the heir.

Fishel vs. Alexander, p. 1533.

Collation is based upon the theory that the person collating has withdrawn from the parent money or property which otherwise would have gone to swell the mass of the succession; it can not apply to amounts which had never been actually received; so where it is shown that a father in a marriage contract declared that he then and there settled a certain amount of dowry upon his daughter, and it is shown subsequently that no such settlement of dowry had been made, the heir will not be held to collate that which she had never received. Art. 2329, C. C., does not apply when there was no reality in act of donation.

Donations *inter vivos* must be accepted in precise terms; in order that the heir be held as a donee and ordered to collate it must be shown that she was a party to the alleged act between her parent and her husband and accepted the donation.

Carroll vs. Succession of Carroll, p. 956.

On the trial of a rule taken to test title, on the ground that same depends upon an act of donation *inter vivos* which is subject to revocation by forced heirs, it should be made to appear from the pleadings that there are heirs *in esse* or *in posse* whose *legitime* would be affected; otherwise there would be no such real and substantial issue as this court could conclude by its decree.

Savings Bank in Liquidation, p. 1428.

EFFECT OF AGREEMENTS BETWEEN PARTIES IN INTEREST.

While the Supreme Court recognizes the right of persons having exclusive interests in a particular matter to make such compromises and agreements concerning the same as to them may be deemed advisable, provided they be not contrary to the law, it can not be controlled by stipulations and agreements relatively to subjects in which third persons may be concerned. If the judgment of the District Court fixing an amount of an administrator's bond be legally correct, the Supreme Court could not reverse it and remand the case with directions as suggested by the parties to the proceeding which provoked the judgment appealed from.

Succession of Levy, p. 1520.

ELECTIONS—PUBLIC OFFICERS.

The courts exert control over public officers with ministerial duties connected with elections, and by the writs designated by law will compel the performance of such purely ministerial duties.

State ex rel. Casse et als. vs. Judge et al., p. 847.

ENDORSER—RELEASE OF.

Whether the endorser of a note is the surety or endorser in the strict mercantile sense, he will be released if, without his consent, the holder releases the maker of the note. Story on Notes, Secs. 423, 424; Civil Code, Art. 3061.

Nor is such defence of the release of the maker at all affected, because, at the maturity of the note, the endorser waived demand, notice and protest.

The vote of the holder of the note at the meeting of the creditors of the insolvent maker, in favor of his discharge, releases the endorser. Civil Code, 2170, 2177; 7 Martin, N. S. 18; 4 La. 295; 42 An. 540.

Such discharge is not that of the law, but results from the voluntary action of the creditor. *Ibid.*

Union National Bank vs. Grant, p. 18.

ESTOPPEL.

A party who permits another to buy property in his name and for his benefit at a tax sale, and takes a counter letter, and afterward, for a consideration, instructs the party, in whose name

ESTOPPEL—Continued.

the title is vested, to retrocede the property to the tax debtor, and is present when the deed is made, will be estopped from asserting claim to the property.

A judgment creditor of the heir of the deceased can not, under such a state of facts, subject the property to the payment of his debt, on the ground that no title ever passed from the purchaser at tax sale, as evidenced by the counter letter.

Finlay & Brunswick vs. Peres, p. 16.

The party to a contract, by delaying to pay the price and finally by acquiescing in the release of the vendor, is precluded at a date subsequent from claiming the property.

Cockerham vs. Perot, p. 209.

A defendant who is sued for property is not estopped in denying plaintiff's ownership of it because, previously, at a time not fixed, he paid rental money on the property.

Heirs of Wykoff vs. Miller, p. 475.

ATTACHMENT.

The plaintiffs having, in a previous suit, judicially affirmed the legality and validity of a sale of goods to the defendant, for the purpose of obtaining a judgment against him for the price, and sustaining an attachment against the goods as his property, can not be heard, in a subsequent suit against the same defendant, to deny the existence of such a sale, on the ground of fraud and deception on the part of defendant, as vendee, for the purpose of defeating the prior and ranking attachments of other creditors, and recovering the goods themselves, notwithstanding the former suit has been in the meanwhile withdrawn.

In such case, the prior attaching creditors can successfully urge the former judicial admissions as an estoppel against the second suit.

Lowenstein & Bro. vs. Glass et al., p. 1422.

EVIDENCE—SALE.

The admissibility of evidence given of facts not alleged should be objected to when offered, and the point reserved.

EVIDENCE—Continued.

Parol evidence (admitted over objection) of a general character, of *ex parte* declarations, will not affect the validity of a title on the ground that the purchaser at tax sale was only the purchaser nominally and that his vendee was the real purchaser.

Heirs of Wykoff, Sr., vs. Miller, p. 475.

In cases of fraud and simulation the conversations and admissions of the parties, even when not made in the presence of each other, their acts and actions are admissible as evidence, leaving to the court from all surrounding circumstances to judge of their weight as evidence.

Unter vs. Bank, p. 238.

A deduction may be drawn from the statement of a witness (such as the amount of a fee or charge on a vessel of itself shows the tonnage of the vessel) without any statement by the witness in regard to the number of the tonnage.

The evidence was brought out in chief, and no attempt was made to show that it was erroneous.

Accounts must be proven by reference to the respective items, and not by average of other items of debts of another date and for different fees or charges.

A verified copy of a report is admissible in evidence and makes proof on the testimony of a witness who knew that it was duly verified.

Board of Control vs. Royes, p. 1059.

PAROL, TO SHOW FRAUD.

If after a conveyance of immovable property, under a resolution of the board of directors of the corporation, the vendor, accepting the offer to buy, is assailed by parties claiming they were the purchasers intended by the fraudulent substitution of those to whom the conveyance was made, it is competent for such parties holding the title by competent deed to show by testimony that the conveyance was in pursuance of their offer to buy, accepted by the board, and thus the conveyance accorded with the resolution; such testimony not infringing on the prohibition of parol to create or destroy title to immovable property.

Rod and Gun Club Company vs. Commissioners, p. 1081.

EXECUTORS.

Under our Code the seizin of the executor subordinated to that of the heir must end whenever the heir requires it, and can not be extended by the will. Civil Code, Art. 1671; *Olague's Case*, 13 La. 6; *Provan vs. Percy*, 15 La. 169; 8 An. 705.

Succession of McCan, p. 146.

ACTS OF.

Unless the appointment of an executor or curator is absolutely void, acts done by him in such capacity are binding and valid. Mere illegality of such an appointment will not vitiate acts done under it.

Vinet, Executor, vs. Bres & Richardson, p. 1254.

EXEMPTIONS.

The staves, heads and iron hoops for the barrel were manufactured in another State and shipped to plaintiff company in this city.

Here the component parts of the barrel are put together, and to it is given its proper shape and finish.

The hoops are flared or splayed so as to fit the bilge of the barrel. Under the authority of *Cooperage Company vs. City et al.*, 47 An. 1314, the points being similar, the court holds that the barrels were not manufactured in this State, and, in consequence, plaintiff's cooperage company is not exempt from taxation under the law exempting the capital, machinery and other property employed in the manufacture of furniture and other articles of wood.

Chickasaw Cooperage Co. vs. Police Jury, p. 523.

The making of soda, seltz and similar drinks is not within the constitutional exemption of property employed in manufacturing chemicals. Constitution, Art. 207, as amended by Act No. 92 of 1886, p. 120.

Seltz and Mineral Water Co. vs. City, p. 768.

The importer of the several pieces of the umbrella or of the parasol, already in a state of preparation, save certain work on some of the pieces of minor importance, is not deemed a manufacturer. The exemption of the Constitution is of textile fabrics and of capital and property employed in the manufacture of furniture and other articles of wood.

EXEMPTIONS—Continued.

The process whereby, in plaintiff's factory, the articles already prepared elsewhere are given the shape and finish of the umbrella for sale in commerce are not the manufacture of articles of wood and of textile fabrics which would entitle the manufacturer to exemption under Art. 207 of the Constitution.

Lake Bros. & Co. vs. Tax Collector, p. 870.

A manufactory not operating five hands usually and customarily is not exempt from taxation under Art. 207 of the Constitution.

Moore vs. City, p. 1452.

The exemption from taxation of a class of manufacturing corporations is not affected by the fact that the corporation engages in a business distinct from manufacturing, the exemption being confined to the property employed in the manufacturing designated in the exemption provision in the Constitution. Constitution, Art. 207, Act No. 92 of 1886.

The processes applied by suitable machinery to animal matter and the offal of the city resulting in vaporizing the moisture, disposing of the gases, separating the grease or oils of such refuse and matter and the *residuum* converted into a fertilizer is the manufacture of such fertilizers within the scope of the provisions of the Constitution exempting from taxation property employed in manufactories.

Fertilizing Co. vs. Assessors, p. 1475.

The proof that the plaintiffs are importers; that they sold the goods in the original packages, but had not collected the proceeds of the sale. The defendant sought to collect a municipal tax upon these goods.

Sales by the importer are held to be exempt from State taxation. The importer by paying duty acquires a right to dispose of the merchandise, as well as to bring it into the country. The tax claimed would have the effect of intercepting the import *in transitu*, to become incorporated with the general mass of the property, and would prevent it from becoming so incorporated until it should have contributed to the revenue of the State.

Gelpi vs. Treasurer, p. 1535.

EXEMPTIONS—Continued.

The plaintiffs, owners of a Mergenthaler Linotype Machine, with which they manufacture linotypes in publishing the *New Orleans Picayune*, are not manufacturers of machinery within the intentment of Art. 207 of the Constitution.

Further, they do not supply dealers and consumers; a requisite for exemption. 34 An. 597; 35 An. 747; 36 An. 347.

Nicholson vs. Board of Assessors, p. 1571.

EXECUTIVE AND JUDICIAL DEPARTMENTS OF GOVERNMENT.

When the question at issue is the power of the judiciary to summarily and positively check by final injunction the exercise of the powers of the executive department in the appointment of an officer, the "matter in dispute" is not measured by the amount which is declared to be the value of the office.

The value of the particular office in question which furnished the occasion from which arises a contest as to the powers of two departments of government will not, in such a controversy, determine the jurisdiction of the Supreme Court.

It is the bounden duty of the judiciary to give some *prima facie* force and effect to the acts of the executive; his acts are not to be presumed illegal and utterly wrong.

The court affirms expressly *State ex rel. Kuhlman vs. Judge*, 47 An. 53, and *State ex rel. Keller vs. Judge*, *Ib.* 61.

State ex rel. Saizan vs. Judge, p. 1502.

EXPERTS—TESTIMONY OF.

Where experts are sworn as to the value of services and differ materially in their estimates it is safe to accept the lowest estimate.

Succession of McNamara, p. 45.

EXPROPRIATION.

Plaintiff proved up its title. The maps introduced in evidence do not impeach the validity of the title or lessen the value placed on the property expropriated.

The defendant having admitted that the property was plaintiff's, and having fixed a value without deduction for a street, is decreed indebted for the whole property, without reference to the street.

EXPROPRIATION—Continued.

The grant of a right to extend tracks through certain designated streets can not be construed into an intended indemnification for property expropriated by the Levee Board.

Railroad Company vs. Levee Commissioners, p. 1099.

The claim that an expropriation of land for railroad purposes by a particular railroad necessarily carries with it, as an immediate and direct consequence, the right of a city or parish to build or carry a street across it without expense of any kind to itself, and without judicial proceedings, is not tenable; certainly not, in the absence of a statute or of the railway company holding its charter subject to such a right.

Railroad Company vs. Mayor and Council, p. 1102.

When the plaintiff in an expropriation suit avails itself of the permission of the statute and deposits the amount of the verdict in the hands of the sheriff, subject to the owner's order, it becomes entitled at once to the right, title and estate of the owner in and to the land described, in the same manner as a voluntary conveyance could do; and in this manner it can deprive an appeal by it prosecuted of a suspensive effect. And in the event of any alteration being made in the judgment on appeal the plaintiff is bound only to pay the increased allowance, or it will be entitled to recover back the surplus paid, as the case may be.

More than usual credit is attributable to the verdict of a jury in an expropriation suit, and it will not be set aside unless manifestly erroneous.

Railroad Co. vs. Morere, p. 1273.

FIERI FACIAS.

A *fi. fa.* prematurely issued is a mere irregularity. If he suffers the delay to expire without any action, he waives the prematurity.

The sheriff may return the writ, *nulla bona*, under the instructions of the plaintiff, immediately after it has become evident that the debtor has no property which can be seized.

The defendants having failed to point out property the sheriff was not bound to seize property under attachment.

Pottery Co. vs. Levi & Co., p. 777.

FOREIGN HEIRS—TAX ON INHERITANCES.

A citizen and subject of Italy is exempt from the payment of the ten per centum tax levied against foreign heirs, on property situated in this State, under Act 130 of 1894, the title to which is derived by testamentary disposition of his mother's will, she having likewise been a citizen of Italy at the date of her death.

The "most favored nation clause" of the treaty between Italy and the United States entitles citizens and subjects of the former to the same tax exemptions as the citizens and subjects of the latter are; and the same right to acquire and dispose of personal and real property within the territory of the latter by donation, testament or otherwise, from or to aliens and subjects of the former. It is both wise and conservative for courts to adhere to what has been repeatedly adjudged; and when the intent and meaning of a law has been settled by the uniform and consistent course of judicial construction, the construction becomes, in so far as contract and treaty rights acquired thereunder are concerned, as much a part of the law as the text itself.

Succession of Rixner, p.552.

FRAUD IN CONTRACTS NOT PRESUMED.

Fraud is not always to be presumed from a breach of contract, when the broken promise will admit of an interpretation favorable to honest intention.

The facts do not show that the failure to deliver cotton (the basis of the attachment) was with intent to defraud creditors.

The law allows the husband to make a transfer *en paiement* to his wife. The settlement with his wife can be corrected by his creditors if it was erroneous and to their prejudice.

Winter vs. Davis, p. 260.

GARNISHEE—NEGLIGENCE.

Where the garnishee is negligent in answering interrogatories and permits a judgment to be entered against him, he can obtain no relief from the judgment.

It is negligence on the part of the garnishee to answer interrogatories and to entrust the delivery of them to the clerk of the court by a messenger in his employment, who fails to deliver the answers to the clerk. The negligence of the messenger must be imputed to the garnishee.

Warren vs. Copp, p. 810.

HABEAS CORPUS.

If a judgment is void it may be assailed collaterally. But if the error is not of such a character as to render it absolutely void, the defendant can not be relieved on the writ of *habeas corpus*. The prevailing rule is that a whole sentence is not illegal and void because of an excess.

Where the period of imprisonment is a separate portion of a sentence complete in itself, the defendant is not entitled to discharge on *habeas corpus*.

The punishment was less than the *minimum* set down in the statute, and gave to the relator no right to his release on this writ.

State ex rel. Dudoussat vs. Sheriff, p. 67.

The right in matter of jurisdiction of one charged with a crime is not as restricted on application for *habeas corpus* as it is on appeal.

Habeas corpus may issue although the fine, exceeding three hundred dollars, has not been actually imposed; it being a possibility under the law, and that possibility being the test of jurisdiction as relates to that writ.

The court is competent to issue the writ of *habeas corpus* in any case that might be brought up on appeal. The fine imposed or the imprisonment fixes the right of appeal *vel non*. All persons before conviction shall be bailable save those charged with crimes especially excepted.

State ex rel. Mahler et al. vs. Judge, p 92.

Relief by *habeas corpus* will be refused in case it is developed by the proceedings to be an application of an accused person for a preliminary examination—neither the Constitution nor the statutes having conferred the power, or imposed the duty, on the Supreme Court, or the judges thereof, to act as committing magistrates.

State ex rel. Johnson and Britton, p. 1405.

See Criminal Law.

HEIRS—RIGHTS OF CREDITORS.

The interest of an heir in the immovables of a succession, as soon as he accepts it, is subject to the right of a creditor whose claim is secured by judicial mortgage, subject to the right of priority of the creditors of the succession. 21 An. 255; 3 An. 34, 36.

HEIRS—RIGHTS OF CREDITORS—Continued.

The heir having in a compromise fixed the value of the *residuum*, and rendered it impossible to settle the succession on the basis of the inventory and other proceedings subsequent, that value will be adopted and payment according ordered.

Railroad Co. vs. Fairer, p. 744.

TO FORECLOSE MORTGAGE ON COMMUNITY PROPERTY ADJUDICATED TO NATURAL TUTOR.

Proceedings taken by heirs of age to foreclose their mortgage against community property which had been adjudicated to the surviving husband and natural tutor are specially provided for in Revised Civil Code, Art. 333, and are somewhat of the character of partition proceedings, and unlike those for the execution of ordinary money judgments or for executory proceedings.

The principle announced in the case of *Koehl vs. Solari*, 47 An. 890, as essential to the effectual removal of the legal mortgage of a minor heir from the property sold in pursuance of such proceedings, is affirmed.

Succession of Aron, p. 817.

PUTTING IN POSSESSION.

The order of court, recognizing plaintiffs as heirs of the deceased, and placing them in possession of his property, is not evidence of his title in a suit by the heirs asserting the ownership of their ancestor brought against the party claiming title.

Chamberlain vs. City, p. 1055.

HOMESTEAD.

The protection of the family is the principal object of exemption laws.

It secures a place of residence which the debtor may improve and make comfortable, and where the family may be sheltered beyond the reach of financial misfortune.

Hence, the exempting statutes should not be too strictly construed. Prior to the debt for which he was seized and continuously since, the debtor was the head of the family and contributed to their support.

Hebert vs. Mayer and Sheriff, p. 938.

HOMESTEAD—Continued.

MORTGAGE.

When a party sells the homestead for an existing debt as the price, and immediately the purchaser transfers it back to the vendor and takes a mortgage and vendor's lien on the property, the transaction will be viewed as one of mortgage to secure the debt, and in violation of Art. 222 of the Constitution.

Stewart Bros. vs. Sutton, p. 1073.

HUSBAND AND WIFE—INDIVIDUAL RESPONSIBILITY.

After a decree of separation of property if the husband disposes of and converts to his own use the separate property of his wife, she has a legal mortgage against the property of the husband for reimbursement.

Where authority has been given to the wife to borrow money by the judge, and she does so and it reaches its proper destination, she will be liable for the amount, notwithstanding no note or mortgage was given to secure the amount.

Pascal & Co. vs. Folse et als., p. 1227.

INJUNCTION.

An injunction by an alleged judgment creditor against the execution of judgments of other creditors can not be sustained, if the judgment on which the injunction is based is shown to be without basis, a simulation and void.

Armistead vs. Ardis & Co. et al., p. 320.

In dissolving such injunction, a reasonable attorney's fee should be allowed defendants, as damages. Code of Practice, Art. 304; Amendment R. S. S. 1755.

Armistead vs. Ardis & Co. et al., p. 321.

Under the provisions of Act 50 of 1886 actual damages resulting may be awarded in the suit in which the injunction has been dissolved.

Levy and Carter, Syndics, vs. Sheriff, p. 537.

A general allegation in a petition of a threatened injury, without any announcement as to what the supposed injury will result from, or as to what it will result in, is totally insufficient to justify an injunction.

Otis vs. Sweeney, p. 940.

INJUNCTION—*Continued.*

The plaintiff having by injunction sought to restrain the parochial authorities from so altering the route of a public road as to cross its track and right of way against its will, without making any demand for damages or other compensation, this court is without jurisdiction *ratione materiæ*, and the appeal must be dismissed on the motion of the appellees.

Railway Company vs. Compton, p. 944.

The court, under Art. 303 of the Code of Practice, is entrusted with discretion in the matter of granting or refusing an injunction, and it therefore does not follow from the fact that an injunction was granted that the court was without authority to grant a motion allowing dissolution on bond.

The allegation that the injunction will cause irreparable injury will not take away from the judge all discretion to dissolve it on bond.

The dissolution of an injunction, upon defendant giving bond, is a matter largely resting in the sound discretion of the court of the first instance, having power of compelling parties to reasonably speed the cause and to prevent losses sometimes occasioned by delay, in quieting the possession on the merits of one entitled to possession.

Cameron vs. Godchaux, p. 1345.

INSANITY—TRIAL OF ISSUE OF.

The application disclosing that relator had been convicted of murder and sentenced to the extreme penalty of the law, and that the respondent had subsequently appointed, at his instance, a commission of medical experts to examine into, determine and report his mental condition; that the majority of the commission had reported relator to be of sound mind, though of a low grade, and thereafter the relator had made an application to the respondent for a trial by jury of the issue of insanity *vel non*, and same had been refused.

Held: That there is no law which imposes upon the respondent the ministerial duty of directing a trial of such an issue by a jury. In such case the allowance of trial by jury must be governed and controlled by the circumstances surrounding, and the situation of the case.

State ex rel. Armstrong vs. Judge, p. 508.

INSOLVENCY.

To a revocatory action for the recovery of an asset, which was pledged and assigned by an insolvent commercial partnership immediately previous to their surrender, an individual member is not a necessary party, because the members of the firm are personated by the creditors to whom the cession is made, and the syndic is their accredited representative.

The syndic is not estopped judicially by the creditors' acceptance of their debtors' cession and schedule. Neither imports absolute verity on its face.

The fact that the relations of factor and customer exist between the insolvents and a particular creditor does not justify the former in pledging or assigning to the latter a mortgage note not relating to their transactions, immediately previous to their surrender, and while their affairs were in a state of financial embarrassment.

Prevost, Syndic, vs. Walther, p. 227.

VERDICT ACQUITTING INSOLVENT ON CHARGE OF FRAUD.

The Supreme Court will not disturb the verdict of a jury on a question of fact in acquitting an insolvent debtor of fraud. To remand the case because the Appellate Court might differ from the jury on a question of fact would be, as stated in 7 An. 258, trenching too far upon the humane principle that no man should be tried twice for the same offence. 44 An. 11.

Monroe vs. His Creditors, p. 801.

FRAUD.

A charge of fraud preferred against an insolvent, under Sec. 1804 of the Revised Statutes, is prescribed by the lapse of twelve months antecedent to the filing of his schedules under order of court.

The insolvent laws of this State provide a purely domestic remedy, which can be availed of only by resident creditors, and those domiciled outside of the State who come into our courts and submit themselves to their jurisdiction, by accepting the surrender by proving their debts at a general meeting of the creditors.

It is of the essence of a charge of fraud under the aforesaid section of the statutes that the opposition should allege and the evidence

INSOLVENCY—Continued.

prove an intention on the part of the insolvent to defraud, and injury resulting therefrom to the complaining creditor.

Marx vs. His Creditors, p. 1340.

The transfer of property by the insolvent debtor, alleged to be in fraud of creditors, will not be set aside merely and only because the transferee is a creditor, and the indebtedness, the consideration of the transfer. If under the circumstances the transfer was to the advantage of the creditors, or at least not injurious to them, the transaction is not within the scope of the revocatory action, one of the elements required in that action being injury to creditors. Civil Code, Arts. 1968, 1970, 1978, 1984; 18 La. 383; 14 La. 322.

If such transfer fulfilled the obligation resting on the debtor before and at the time of his insolvency, there is no room for the revocatory action.

The court adverts to the line of decisions that deny to syndics the right to disturb *bona fide* transactions of the insolvent, for informalities or such defects as non-delivery in contracts of sales; defects which the insolvent could not urge. 9 An. 539; 5 An. 274; 37 An. 472.

Baldwin, Receiver, vs. McDonald, p. 1430.

See Mortgages.

INSURANCE.

A paper headed conditions, containing a stipulation that the assured shall at all times keep his commercial books and papers in an iron safe, to preserve them from fire, the paper being plainly marked as part of the policy, delivered to and accepted by the assured, will be deemed part of the policy, especially when the assured sues upon the policy with the paper attached as constituting his contract.

Such a stipulation is a promissory warranty, the breach of which is not cured by the allegation that from oversight or neglect on the part of the assured, or his clerk, the books were not in the safe on the night of the fire, and the policy is avoided by the breach. Wood on Insurance, Sec. 179.

Goldman et al. vs. Insurance Co., p. 223.

INSURANCE—Continued.

Losses of an insurance company are necessary incidents of its business; are constantly occurring and are provided against in the risks undertaken; and premiums are collected for the purpose of reimbursement.

The reimbursement of reinsurances which are involved in pending litigation between the insurance company and its correspondents and customers does not constitute a proper object of reduction in assessment.

Nor is an over-estimate, made of unearned premiums collected and returned to its policy-holders, on account of cancellation of policies, a proper object of reduction. It is natural and to be expected that such estimates will fluctuate, and hence an assessment which is predicated upon an estimate can not be absolutely certain.

Home Insurance Co. vs. Assessors, p. 451.

CONTRACT TO REPAIR; DAMAGES.

Damages having been sustained by plaintiffs' building by the falling of an adjacent wall, occasioned by fire, the insurance company availed itself of an option in its contract to repair the injury. In the meanwhile, the necessary repairs being in course of completion, an accident is caused by the faultiness of the materials used and the carelessness and negligence of the workmen in the defendants' employ, whereby the building is collapsed and rendered untenable, and the tenant is rendered unable to continue his occupancy; *Held*, that plaintiffs have stated a cause of action upon alleging these facts for the recovery of damages *ex delicto*, from defendants.

Henderson vs. Insurance Company, p. 1081.

ELECTION TO REPAIR.

When an insurance company, under its contract, elects to repair and fails to do so, and the assured completes the repairs, the insurance company is liable for the cost of the repairs without reference to the amount of the insurance.

The election to repair is a contract which can only be discharged by its performance or execution. Defects in the material in the original building will not excuse non-performance.

INSURANCE—Continued.

One contract may be more or less connected or dependent upon another; one might not have existed at all but for the prior existence of the other; and yet the two be legally separate and distinct. *Walker vs. Villavaso*, 15 An. 717.

Henderson et al. vs. Insurance Company, p. 1176.

The statement made by the original insurer in obtaining the reinsurance "we carry our line," no amount of the line specified, will not be deemed falsified, if in point of fact the insurer does bear a part of the risk—i. e., to the extent not reinsured.

Nor in respect to another risk, part of which was reinsured, is the reinsurance avoided for fraud, because of such statement in obtaining the reinsurance, although it turned out the insurer bore no part of the risk, owing to the fact the insurer did not put on board the entire cargo agreed to be insured by the original insurer, he believing when he effected the insurance such cargo would be at risk, in which case he would have borne a large part of the risk. 3 Kent, p. 284; Wood on Insurance, Sec. 290 *et seq.*

The reinsurance may be for the whole or part of the risk taken by the original insurer, and the effect of reinsurance is to bind the reinsurers to make good to the original insurer the loss up to the amount reinsured. 3 Kent, p. 278; Elliott on Insurance; Sec. 3; Biddle on Insurance, Sec. 378.

Reinsurance not to take effect, except above a stated amount of loss, a contract of a special character can not be inferred from the mere statement of the original insurer in effecting the reinsurance "we carry our line," least of all when the written contract of reinsurance is in the ordinary form of insurance against loss to the extent of the amount specified in the policy.

Chalaron vs. Insurance Co., p. 1582.

INTERMEDDLER—EXECUTOR AND TUTOR.

The executor and tutor of the minor heirs of the testator who takes charge of property of a partnership of which the deceased was a member, the other partners giving the property no attention, is not to be deemed an intermeddler, but however his control of the property may be regarded, he acquits himself of all respon-

INTERMEDDLER—Continued.

sibility by proper care of the property and its faithful application in discharging the partnership liabilities. Civil Code, Arts. 2295, 2299.

Hewes vs. Baxter, p. 1803.

INTERVENOR—WHEN NOT A THIRD PARTY.

The intervenor was informed of plaintiff's privilege on the two notes sued on in the first suit and in the present suit, and therefore must have known of the existence of this claim before the proceeds of the cotton came into her hands. The intervenor was bound to discharge the debt out of the funds in her possession; failing to thus discharge it she became personally responsible.

Hewitt et als. and Bank vs. Williams et als., p. 687.

INTERVENTIONS.

The intervenor is entitled to the time necessary to cite the parties and put the intervention at issue; held that judgment twelve days after the filing of the intervention confirming the principal demand and dismissing the intervention then at issue, denies the intervenor's rights. C. P., Art. 389 *et seq.*; 16 La. 264; 12 An. 460; 8 An. 331.

Lumber and Shingle Co. vs. Hart, p. 1034.

ISSUES DECIDED TO CONTROL.

Issues decided in a case, unless manifestly erroneous, must control all the subsequent steps in the case.

Claffin Co. vs. Davis, p. 1223.

JUDICIAL MORTGAGE CREDITORS.

Where several parties have obtained and recorded judgments against a common debtor, who, prior to the obtaining of the judgments, made a simulated sale of his property, on the return of the property to the debtor the judicial mortgages will rank according to the date of their recordation.

Where the debtor puts a special mortgage on the property before transferring it, which was null, and this mortgage and the note evidencing the pretended debt is purchased for an insignificant

JUDICIAL MORTGAGE CREDITORS—*Continued.*

amount from the holder by one of the creditors purchasing the property, he can not assert the rights of an innocent holder against the other creditor who is also pursuing the property and who has attacked the mortgage.

Schwabacher vs. Leibbrook, p. 821.

JUDICIAL SALES—ADVERTISEMENTS; AUCTIONEERS' FEES.

Sales made in succession proceedings by orders of court are judicial sales; adjudicatees at such sales can not be made to occupy the position of parties purchasing through conventional sales.

Mere concurrence of opinion among heirs as to some of the details to be followed in the making of judicial sales has not the far-reaching consequence of altering the legal character of the proceedings. Sales made in the course of proceedings for a partition do not constitute the partition. They are incidents of the partition, means leading to the ultimate judicial adjustment of rights.

Under Sec. 18, Act 40 of 1877, there is but one single "*first insertion*" in a judicial advertisement, all others following the "*first*" are "*subsequent insertions*." The doctrine of "*alternate first insertions*," by making the advertisement non-consecutive, and charging each first insertion of a renewed advertisement as an "*alternate first insertion*," is not sustained by law.

The fees of an auctioneer are regulated by R. S., Sec. 160. When property is sold by order of court to effect a partition the fee of one per cent. on all sums under twenty-five hundred dollars, and one-half of one per cent. on all sums over that amount.

Succession of Von Hoven, p. 620.

A purchaser at a judicial sale who, before paying the price, or entering into the possession of the thing sold, discusses illegalities in the proceedings which have led to the sale, calculated to throw a cloud upon his title, may refuse to execute the purchase. 9 An. 560.

The presumption *omnia rite acta fuisse*, created by the law for his protection, can not be invoked against him, as an estoppel, although available to throw the burden of proof upon him of the illegalities of which he complains. *Id.*

Succession of Nash, p. 1573.

JUDGES—RECUSATION OF.

Act 129 of 1877 was repealed by Act No. 40 of 1880. The latter act does not authorize a judge to enter an order of recusation in chambers.
Ex rel. Thibaut vs. Judge, p. 1074.

When a District Judge is a party to a contested election suit, and his recusation is suggested on the ground of personal interest, it is his duty to enter in said cause an order, in open court at term time, recusing himself, and for the trial thereof appoint some judge of an adjoining district to go into his court and try and determine the cause.

In case said recused case has not been tried within nine months from the date of the judge's recusation, it shall then be the duty of the judge to order the transfer of the case into the court of an adjoining district for trial.

There is no law in force which provides for the order of recusation to be entered in chambers, and *mandamus* will not go to respondent coercing him to do so.

Ex rel. Wilkinson vs. Judge, p. 1137.

JUDGMENT.

The failure of a judge to render a judgment in a case within thirty days after it has been submitted to him, as required by Act No. 72 of 1884, does not carry with it as a penalty the nullity of a judgment subsequently rendered by him, if it be otherwise legal.

Landry et als. vs. Succession of Landry, p. 48.

EFFECT OF, WHEN REVERSED ON DEVOLUTIVE APPEAL.

When the defendant's property has been sold under a judgment reversed afterward on a devolutive appeal, the defendant entitled to restitution of his property may seek relief by an action for damages in which the judgment will be based on the value of the property, the costs of the suit, counsel fees and other expenses incident to the sale, deducting the amount of the debt of the plaintiff satisfied by the execution sale. 15 La. 46; 15 An. 97; 38 An. 474.

Fisk vs. Egan, Jr., et al., p. 60.

When the judgment of the lower court leaves the rights of parties not clearly defined or fixed by it, but to be determined by impli-

JUDGMENT—*Continued.*

cation and reasoning, the case will be remanded with instructions to render another judgment in the case.

Administrator vs. Lumber Co. et al., p. 677.

A judgment must be read and signed by the judge in open court, unless there is an agreement of the parties, or their counsel, that he may take the cause under advisement and sign a judgment in chambers after the term of court has adjourned.

State ex. rel. Illinois Central R. R. Co., p. 905.

An adjudicatee at a judicial sale to whom is conveyed a judgment decreeing the nullity of a tax sale acquires no right, title or interest in the property.

Such a judgment is analogous to one that fixes a *status*, recognizes the capacity of an heir, the right to a homestead, the nullity of a marriage, the validity of a will or the right to a divorce.

Such a judgment, when once pronounced, has accomplished its purpose, and is not subject to execution like a money judgment.

Cucullu vs. Bilgery et al., p. 1245.

JURIES—IN CIVIL CASES.

The *proviso* in Sec. 8 of Act 80 of 1894 is embraced within the meaning of the title to the act, which is an act relative to juries and intimately associated with it; is *germane* to the object and purposes of the act, and is valid and constitutional. The *proviso* was not repealed by Act 152 of 1894.

Soniat vs. Supple, p. 246.

It is within the power of the Legislature to authorize district judges to cause a jury to be drawn at any term of court or at any time during the term. Sec. 8 of Act 1889 in the *proviso* to said section authorizes the District Judge to cause a jury to be drawn to try a civil case in which there is a prayer for jury during the term of court at which the prayer is fixed and the jury ordered. But the jury must be drawn by the jury commissioners, as the judge has no authority to order the sheriff to select a jury. The order of the judge to summon the jury, directed to the sheriff, must be after the jury has been drawn by the jury commission.

Id.

JURISDICTION.

The value of a succession would determine the jurisdiction of the Supreme Court, and not the ruling of the District Court, upon a matter merely raised incidentally and determined in the District Court for the purpose of reaching a conclusion upon a matter touching the administration of the succession.

A court of limited or special jurisdiction has frequently to pass incidentally upon a subject when it would not be authorized to do so if it had been presented to it for adjudication in an original or direct action. 5 N. S. 10, 217; 6 N. S. 805; 7 La. 378; 12 La. 214; 3 R. 100; 4R. 165, 278, 290; 6 R. 488; 3 An. 582.

The issues of a case can not be split and divided; the incidental question accompanies the main issue and the main issue fixes the jurisdiction. *Succession of Rose*, p. 418.

ACTION OF NULLITY.

Interest accrued when the suit is brought is to be computed in the amount required to give this court jurisdiction of the appeal. Constitution, Art. 81; 12 La. 156; 2 An. 793.

The remedy against judgments obtained by fraudulent practices is the action of nullity; the grounds for such an action can not be urged as a defence in the suit to revive the judgment. Code of Practice, Arts. 604, 607, *et seq.*; 23 An. 173; 30 An. 130; 33 An. 342; 34 An. 520.

Bruno vs. Oviatt, p. 471.

JUSTICES OF THE PEACE—PROCEEDINGS BEFORE.

The defendant cited to answer the demand before the justice of the peace, is entitled on entering his appearance to a reasonable delay for procuring testimony, and if judgment against defendant is rendered without the opportunity afforded of obtaining his testimony, relief will be given by the writ of *certiorari*, directing the trial anew, and arresting the execution of the judgment. Constitution, Art. 90; Code of Practice, Arts. 1083, 1084, 864, 866; 35 An. 1101.

State ex rel. Green vs. Justice, p. 1374.

Under the Code of Practice the justice of the peace is not required to assign and try separately from the answer the exception on which the defendant relies. Arts. 1032 *et seq.*, 1036.

State ex rel. Brackenbridge Lumber Co. vs. Justice, p. 1532.

JURY COMMISSIONERS.

The District Judge has the right, at any time, to appoint jury commissioners, and the exercise of this right will not be interfered with. When a judge succeed another who, during the incumbency of his office, ordered a special jury term, the new judge can set aside the order.

State ex rel. Wilkinson vs. Judge, p. 1542.

LANDLORD AND TENANT.

A lessor who obtains a legal judgment against his tenant and has it executed pending a devolutive appeal, is responsible for the actual damages occasioned to the tenant.

Mengelle vs. Abadie, p. 669.

LAST WILLS AND TESTAMENTS—SUBSTITUTION.

A testamentary disposition in favor of minors conditioned they attain majority, the shares of those who die before to accrue to the survivors, carries all the mischiefs of the prohibited substitution, though not one in the technical sense. By such will against the text and spirit of our law, ownership, with its attributes of possession, enjoyment and power to sell not vested at the death of the testatrix is suspended indefinitely, *i. e.* until the youngest child becomes of age; for the same period the property is stamped with inalienability and put out of commerce, and besides the testatrix undertakes to designate the heirs of those of the legatees who may die after her, while under the law the testamentary power is exhausted when the testatrix designates the heir living at her death. Civil Code, Arts. 1519, 1520; 5 An. 461; 7 An. 416, 420; 8 An. 248.

Succession of McCan, p. 145.

OWNERSHIP DERIVED FROM.

The power of last will derived from the law must be exerted, so as to conform to ownership and its modifications prescribed by the Code, and can not introduce into our system novel titles. Under our law the heir, testamentary or legal, must be vested with full title at the death of the testatrix, the extent and limitation of her power in this respect being marked by the permission of the Code, that for a single life ownership may be divided by the

LAST WILLS AND TESTAMENTS—*Continued.*

will giving to one the usufruct and the title to another; hence, the will instituting the heir under a condition conferring on him no present right, at the same time excluding the legal heir from all possession and control, and substituting for both the testamentary and legal heir a species of trusteeship to hold and render the property to the heirs, whoever they may be, who survive when the condition is fully prescribed by the testatrix, is void as against our law and the policy on which it rests, because seeking to introduce a tenure our law does not recognize or enforce. Civil Code, Arts. 488, 491 *et seq.*; 533 *et seq.*; 544 *et seq.*; 940, 941, 942, 943, 944, 945, 946, 947, 1607, 1613, 985, 1522; Code Napoleon, Arts. 718, 724, 1040; 7 An. 416; 8 An. 248 *et seq.*; 5 Merlin, 368, 369.

Succession of McCan, p. 145.

FIDEI COMMISSA.

The testamentary disposition that executors shall hold the property of the testatrix, make necessary investments, provide for the education and support of the minor legatees, and administer until they attain majority, the property then to be delivered to them by the executors, is substantially a trust for minors, none the less, because sought to be conferred on executors clothed by the law with no such functions, and such disposition falls within the prohibition by our Code of all *fidei commissa*. Civil Code, Arts. 1520, 1668, 1666, 1668, 1670, 1671, 1672, 1674, 1675; 13 La. 6; 3 An. 483; 5 An. 460; 7 An. 420; 8 An. 248; 12 An. 767; 15 An. 154; 30 An. 1020; 36 An. 755.

Succession of McCan, p. 146.

It is not required for the validity of the mystic will that it be closed with wax; mucilage or other adhesive substances may be used adequate to the firm closing of the envelope, and the law does not exact that any seal be impressed on the envelope. Civil Code, Article 1584; 15 La. p. 88; 3 Troplong Donations et Testaments, p. 166; 2 Vazeille, 477.

Saint vs. Charity Hospital et als., p. 286.

The testator had bequeathed a promissory note to certain legatees named. The note, after the date of the will, was collected at the

LAST WILLS AND TESTAMENTS—Continued.

instance of the testator, and the amount placed to his credit. The legacy was of a note and not of a sum of money. There was revocation of the legacy.

An ink line was drawn on the will, across the particular legacy; if drawn by the testator, as there is reason for presuming, it furnishes additional proof of intention to revoke the testament.

Succession of Batchelor, p. 278.

A will provided for the payment of debts, and the residue of the property to go to legal heirs, who were made executors: *Held*, that they were not legatees in the sense employed in Art. 1833, C. C., and were entitled to receive commission allowed by law.

Succession of Gardère, p. 289.

The requirement of the Code that the olographic will shall be dated, requires that the day of the month shall be stated; the day is part of the date, and the month and the year, without the day of the month, avoids the olographic will. Civil Code, Art. 1588; Napoleon Code, Art. 970; 4 Boilleux, 31; 3 Troplong, par. 1479; Coin Delisle, pp. 151-542; Lagrave vs. Merle, 5 An. 278; Fuentes vs. Gaines, 25 An. 85-107.

Heffner vs. Heffner, p. 1088.

The intent of the testator is to be determined from the whole will. Every word shall have effect if it can be done without defeating the general purpose of the will, which is to be carried into effect in every reasonable method.

When the reading of a whole will will produce a conviction that the testator must necessarily have intended an interest to be given, which is not bequeathed by express or formal words, the court will supply the defects by implication, and so mould the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion, that he has on the whole sufficiently declared. Punctuation must give way whenever it interferes with the proper and reasonable construction of a will. The testator made the following disposition: "The other half of Rienzi and a claim I hold against the government of the United States for army supplies, I think is about one hundred thousand dollars. These two amounts, or halves, I intend to give

LAST WILLS AND TESTAMENTS—*Continued.*

to the families of my brother Thomas H. Allen's four children
 * * * And to the five children of my sister Cynthia A.
 Smith" * * * *Held*, that the testator intended the children of his sister to participate in the legacy, and that he grouped the legatees into families, and they took *per stirpes*.

Succession of Allen, p. 1086.

The general description of property, or the classes or kind in a will, preceded or followed by words of narrower import, if the bequest is not residuary, will be confined to species of property of some kind with those previously described. The adoption of the more comprehensive meaning would have the effect of rendering the superadded expression nugatory; and make the testator employ additional language without any additional meaning.

In order to give effect to the general as against the restricted words in the will, there must be some expression in the will to show that the testator intended to pass the residue of his estate.

The will speaks from the death of the testator, unless the language used, such as the word *now*, or a verb in the present tense, which requires it to be taken at the time it is used. The testator, speaking by and through his will, instructed his executors to sell his Rienzi plantation, and gave them a designated time in which to act, and directed that, until the sale, the wife should receive the proceeds of the plantation, if worked, until sold. *Held*, that the wife was entitled to the net proceeds as long as the plantation remained in the hands of the executor, and the proceeds of the crop growing on the place at the time of his death passed to his wife.

Coal on the plantation for the service of the sugar house is immovable by destination. If the coal and other immovable things by destination are consumed in the cultivation of the place and the manufacture of the crop for market, the legal heirs have no claims for reimbursement.

The legacy of an English education to two small boys, at the expense of the estate, is not void for uncertainty.

A sum of money bequeathed to nieces, with the expression "and have no interest in any other claim," and the remainder of the

LAST WILLS AND TESTAMENTS—Continued.

estate is the only fund upon which they could assert any claim, they can not participate in the residuum of the estate.

Id., p. 1037.

REVOCATION OF.

Testaments are revocable at the will of the testator until his decease.

When a prior will has been made the testator has a right up to his death to *formally* announce that he has changed his mind.

Article 1692, C. C., does not require that this act of revocation should itself be a *testament*; it only requires that it should be "an act" in "one of the forms prescribed for testaments and clothed with the same formalities."

Succession of Seymour, p. 963. .

LAWS—REPEAL OF.

The repeal of statutes by implication is not favored.

The two statutes are not in irreconcilable conflict. Hence, the new law does not repeal the old law.

State vs. Brown, p. 1569.

COURTS, MANDAMUS.

While the courts can have no right to pronounce an abstract opinion upon questions entirely political, to compel officers to perform specific duties imposed upon them by law, whether relating to elections or to any other duty devolving upon them, writ of mandamus issues to compel a proper execution of a purely ministerial duty.

State ex rel. Supervisors of Election vs. Judge, p. 827.

LEASE OF VESSEL—RIGHTS OF LESSOR AFTER DEFAULT OF LESSEE.

Ship agents and fruit dealers having contracted for the lease of a vessel for use in their business, at a fixed price and for a definite term, deliverable about the 30th of July, 1894, are not at liberty to recede from their engagement at will, and decline to accept delivery, if tendered seasonably; and, having declined to accept delivery of the vessel when formally tendered to them on the 29th of July, 1894, they have become bound to the plaintiff as lessors in the full amount of the price stipulated in the contract.

LEASE OF VESSEL—Continued.

An effort on the part of the lessors, subsequently to the defendants' default, to use the vessel so as to reduce their damages to a *minimum*, can not be viewed as an acquiescence in their abandonment of their contract, which defeats plaintiffs' recovery.

Orr, Laubenheimer Company, Ltd., vs. Wilson & Co., p. 1813.

LEASE—RIGHT OF OCCUPANCY.

The purchase by the lessors at the syndic's sale of the right of occupancy of the leased premises, subject only to their claim for unpaid rent, does not cancel the lease with respect to rent paid by the application of the proceeds of movables subject to the lessor's privilege and brought by them at the sale. The case is discriminated from *Bartels vs. Creditors*, 11 An. 433. See also 14 An. 213; 17 An. 174; 37 An. 587; 39 An. 743; 40 An. 267.

Such a purchase binds the lessor only for the amounts bid for the right of occupancy and cancels the lease so far as respects the unpaid rent. C. C., Art. 2217 *et seq.*

Vilavaso vs. Creditors, p. 946.

LEGACY—PARTICULAR LEGATEE.

A particular legatee who was indebted to the testator when the will was executed and when the testator died, is not entitled to have the debt remitted because of the particular legacy to him.

Spath vs. Zeigler, p. 1168.

LESION—SALE AVOIDED FOR.

The principle that to avoid the sale for lesion the inadequacy of price must be clearly proved is applied in this case. Civil Code, Art. 2589; 12 Martin, 421; 5 La. 382.

Rod and Gun Club Co. vs. Commissioners, p. 1081.

LIBEL.

An individual citizen complained to certain public officials of the non-performance of duty by a corporation which, under a conventional contract, was acting as a public agency. He had reason to believe the officers addressed had supervisory control over the corporation's acts. The contract affected separately, both by way of right and obligation, individual citizens. The

LIBEL—Continued.

corporation brought an action for libel, against the complaining citizen, for language used in the complaint. *Held*: As the language contained in a complaint so made could hardly occasion injury against a corporation so engaged under a contract conferring upon them vested rights, the allegation of plaintiff's petition should show the existence of facts from which injury could arise.

Fertilizing Co. vs. Wolf & Son, p. 631.

LICENSE—EXEMPTION FROM.

Banking institutions, incorporated under the banking laws of the State, with a capital less than the minimum, expressed in paragraph thirteen of the revenue license law, can not be required to pay license.

The legislative intention to levy a license must be distinctly shown; it can not be extended beyond a clear import of the words of the statute.

If it were not the intention of the General Assembly to exclude them from the terms of the law, the omission can not be supplied by construction.

Ex rel. Houston, Sheriff, vs. Bank, p. 1029.

LIFE INSURANCE.

In case an insurer and insured agree that the latter may give and the former will accept notes for the first annual premium on a policy of life insurance, payable in instalments, and that the default of the maker in paying any one of them at maturity should operate as a revocation of the policy, default on the part of the insured makes the contract void *ipso facto*, both as to the insured and the beneficiary.

The rights of a beneficiary in a life insurance policy are purely derivative, and altogether dependent upon the terms and conditions of the contract. He can insist upon the integrity of the contract being preserved and maintained in *statu quo*. Nothing more. He can not claim the right to be placed in a better position than the insured has placed himself.

Fenn vs. Insurance Co., p. 541.

LIFE INSURANCE—Continued.**POLICY ASSIGNABLE.**

The policy executed on the life of the deceased was a valid contract, and as such was assignable to the defendants for the amounts held due.

Hays vs. Lapeyre and McCaleb, p. 749.

Under a contract of life insurance issued by a mutual company, conditioned to be subject to any by-law thereafter to be enacted, the insured is bound by a subsequent by-law forfeiting such policies when the insured should die by his own hands.

Daughtry vs. Knights of Pythias, p. 1203.

MANDAMUS.

Where the tax collector has, under instructions from the City Council, discontinued the collection of the tax under the first ordinance, he may be ordered to proceed by a direct order of court in a *mandamus* proceeding directed against him, without the necessity of making the common council a party.

State ex rel. Construction Co. vs. Tax Collector, p. 29.

MASTER AND SERVANT.

It is the duty of the master to keep his premises in a safe condition, so as not to endanger the life and limbs of the servant. Hence, the master will be responsible in damages for the injury to the servant, who, without knowledge or warning to guard against the accident, falls into a ditch of scalding water permitted by the master on the premises, the servant's duties requiring him to approach or pass the ditch, left uncovered, with no railing or other means provided to guard against accidents. Wharton on Negligence, Secs. 206, 203, 211, 212; 17 Wallace, 553; 100 U. S. 215.

Such a risk is not incident to the servant's duties, and, unless he had knowledge of the danger and assumed the risk or by his own negligence fell into the ditch, his action against the master for the damages will not be affected. *Ibid.*

Nor in such case will the master's responsibility be affected by the fact that when the accident occurs the servant is not in the actual employ of the master, but is being conducted by the mas-

MASTER AND SERVANT—Continued.

ter's manager to that portion of the premises where the danger exists and the master proposes to employ the injured party.

Powers vs. Sugar Co., p. 483.

While it is the duty of the master to keep his premises in a safe condition so as not to endanger the life or limbs of the servant, yet the servant will be denied relief against the master for injuries arising out of the unsafe condition of his premises, if with ordinary prudence the servant could have avoided the injuries. Thompson on Negligence, pp. 946 *et seq.*, 1008, Sec. 15 *et seq.*

McCarthy vs. Iron Works, p. 978.

The lineman of the defendant company in the discharge of his duty was ordered to take down a guy wire from an electric pole and guy tree. The pole had not been securely planted. It fell on the lineman, inflicting injuries of which he died. The vice o construction was latent and concealed. The officers of a preceding board of management had been notified of the defect. The company is not relieved under the plea of want of notice, although the present general manager had not been notified, but the preceding manager or superintendent.

The lineman did not voluntarily place himself in a dangerous position.

The employee is not bound to know latent, but patent defects.

The master must provide suitable appliances.

Bland and Wife vs. Railroad Company, p. 1057.

MARRIAGE—PUTATIVE.

The marriage decreed null produces civic effects when contracted in good faith.

The wife who, in good faith, marries a divorced man, believing the divorce was legally obtained, if the divorce be subsequently declared a nullity is protected by those laws enacted for the protection of the weak and innocent.

The effects which the husband and wife, at the time of the dissolution of the marriage owned, are presumed common effects or gains, unless it be satisfactorily proved which of those effects they brought in marriage. The same rule applies to a putative marriage in so far as the spouse, in good faith, is concerned.

MARRIAGE—PUTATIVE—Continued.

The costs of settlement of community interests are charged to each in proportion to the interest of the respective parties.

Succession of Barry, p. 1143.

MINORS—SUIT TO RECOVER PROPERTY.

In a suit by minors for the recovery of property illegally sold, an antecedent tender of the purchase price is not required. The defendant will be allowed to set up his claim in reconvention.

Aronstein vs. Irvine, p. 301.

MINOR'S PROPERTY—SALE OF—TUTORSHIP OF FATHER WHEN BOTH PARTIES ARE ALIVE.

In case of sale being made of a minor's property during the lifetime of both father and mother, the father may occupy the place of tutor *pro hac vice*, and in such event the law clothes him with the power of a tutor in point of fact, and consequently he is dispensed from furnishing security, taking and subscribing an oath, having an inventory taken or causing a mortgage to be inscribed against himself, and the like.

PARTITION OF—JURISDICTION OF COURT TO ORDER.

When immovable property situated within the jurisdiction of one of the parishes of this State territorially forms the subject of a partition amongst co-proprietors, some of whom are minors domiciled in other States of the Union, the court possessing jurisdiction of the partition suit and proceedings is fully authorized to direct the proceedings of a family meeting to deliberate and advise touching the interest of minors interested who reside abroad.

Succession of Allen, p. 1240.

MORTGAGES—RIGHT OF A MORTGAGOR TO PROCEED.

A probate sale only divests mortgages which have been imposed upon property by the deceased, and not those which have been imposed upon it by his vendors; and no greater right can be affirmed of a sale made by a syndic of an insolvent's estate.

A holder of a mortgage first in rank, which was granted by the vendor of the insolvent, may proceed by seizure and sale in its foreclosure, disregarding a previous order of sale, granted in favor of the syndic of his mortgagor's vendee.

MORTGAGES—RIGHT OF MORTGAGOR TO PROCEED—Continued.

Under the provisions of Act 50 of 1886, actual damages resulting may be awarded in the suit in which the injunction has been dissolved.

Syndics vs. Sheriff et als., p. 410.

REINSCRIPTION.

All mortgages (save those excepted by law) must be recorded, and their inscription renewed before the expiration of ten years; otherwise their effect ceases even between the parties.

Delogny vs. Creditors, p. 488.

ADVANCES TO BE MADE.

A long settled account, made the basis and consideration of a mortgage, given in due form, will not be opened and disturbed, unless upon clear and positive evidence that the error was owing to misrepresentation and fraud. If there was error in the settlement (resulting from the failure to properly examine an account), the mortgage given some time prior to the declaration in insolvency remains as a binding obligation; also, the notes identified with the act of mortgage. This rule applies to the amount acknowledged by the debtor as due for advances made prior to giving the mortgage; as to advances "to be made," covered by the terms of the mortgage, the debtor is not concluded from pleading the illegality of the charges.

No actual delivery of the bounty of the government was ever made by the pledgor to the pledgee. Without delivery there was no pledge.

Delogny vs. Creditors, p. 488.

VENDOR'S PRIVILEGE.

Notes secured by a mortgage and vendor's privilege pass to third persons, with mortgage and privilege by which they are secured, unaffected by the unreality of the transaction (at the origin), of which the holder by transfer had no notice.

If one of the two debtors *in solido* be solvent, the creditor is without a right of action to have annulled a transaction of the insolvent debtor.

Dreyfous vs. Childs et al., *Loeb & Bros.*, *Intervenors*, p. 872.

MORTGAGES—Continued.

The creditor in good faith, acquiring his mortgage from the recorded owner, is not affected by the fraud of the vendor or vendee practised in the conveyance of the title. 11 La. 408; 4 An. 83, 286; 1 An. 286; 2 H. D., p. 1373, No. 1.

The right of such mortgage creditor to seize and sell the property is not affected by the suit of the wife of the vendor to annul the sale on the ground it was a fraud on her rights, the suit being directed not against the mortgage creditor, but only against the reputed heir of the husband. 45 An. 1085; 47 An. 49.

Lacassagne vs. Abraham, p. 1160.

Mortgages—See Homestead.

See Constitutional Law.

MUNICIPAL CORPORATIONS—CHARTER OF.

The clause in the charter of the city of Monroe "to fix the squaring and to prevent any encroachments upon or the stopping and obstructing the streets" * * * gave to that city the right to pass the ordinance to cause the removal of obstacles from the public streets; but the right of a person who denies the legality of the exercise of that power, in respect to a particular locality, to apply to the courts for the purpose of judicially testing whether it fell under the operation of the power, is equally clear.

Railroad Company vs. Mayor and Council, p. 1102.

NEGLIGENCE.

While it is held that it is the duty of those in charge of a car, at crossings particularly, to be careful and watchful, those who use street crossings must exercise a reasonable degree of care and watchfulness.

The motorman had a right to suppose that plaintiff's son would not, after warning, attempt to cross immediately in front of the car at a distance too near to prevent the accident.

While no one should be held to a degree of care and caution beyond his years, a boy of eleven years and four months of age can not be relieved from the exercise of all care and prudence.

McLaughlin vs. Railroad Co., p. 23.

NEGLIGENCE—Continued.**ASSUMING RESPONSIBILITY OF RISKS.**

Where one goes on premises by implied permission, he does so at his own risk, assuming the responsibility of all risks incident to the place.

Where there are two avenues of travel and the more dangerous one is selected, the party injured can not recover if the injury inflicted was due to the risk incident to the route selected. The traveler assumes all risks in such cases.

Settoon vs. T. & P. R. R. Co., p. 807.

Where a child of the age of four years, a passenger on a street railway car, is accompanied by a person of sufficient age and discretion to take care of it, is put off the car at the child's stopping place, by the conductor, and the person having charge of the child follows it, and both reach the street in safety and are waiting for the passing of a car on a parallel track, the railway company is not responsible in damages if the child runs toward the passing car, strikes it and is thrown down and injured.

Schneidau et al. vs. Railroad Company, p. 866.

CROSSING CAR TRACKS.

Parties having occasion to cross a car track must bear in mind that in the management and business of railroads special trains are liable to be sent forward at any moment, and that the rule that a person before attempting to cross a track must stop, look and listen to guard against danger is not confined to certain hours of the day or night nor limited to particular trains.

Vincent, Tutor, vs. Railroad and Steamship Company, p. 933.

The mere fact of an accident does not carry with it a presumption of negligence. The facts and circumstances connected with the accident must be shown so as to enable the court to trace results to definite causes.

Henry vs. Lumber Co., p. 950.

The fact that a child may not be capable of contributory negligence does not always render the defendant liable upon the mere proof of the act causing injury.

No liability for sudden act of a child.

NEGLIGENCE—Continued.

If the defendant's employee was not careless or negligent, it can not be rendered liable.

Culberson vs. Railroad Co., p. 1376.

See Master and Servant.

NEGOTIABLE PAPER—EQUITIES.

Where a person, a few days after the execution of a note, payable on demand to maker's order and endorsed by him in blank, has had the same transferred to him in good faith for a valuable consideration, in due course of trade and without notice, as collateral security for a note due to him by a third person, to whom the maker had delivered it, the equities existing between the original holder and the maker are cut off, so far as they affect the second holder, and they are not thrown open because, at a later date, the party holding the note as collateral accepts it in absolute ownership and credits its amount upon the main or principal note.

Where it is shown that a person, claiming to have held a negotiable note, endorsed in blank as collateral for a note due to her by her brother-in-law, placed it in the hands of her sister, the wife of her debtor, for safe keeping, but subsequently regained possession of it, accepted it in full ownership and credited the amount of the same upon the main or principal note, the fact, whatever weight it might have as throwing a suspicion upon the reality of the original situation of the parties, does not, if their reality has been established, work a forfeiture of the rights of the pledgee and open the equities.

McPherson vs. Boudreau, p. 431.

NEW ORLEANS—LEASE OF MARKET STAND.

In case the City Council grants to any person a lease of a market stall or stand, in the vicinity of a market of the city, revocable at its pleasure, the tenure of the lessee or of any sub-lessee, is necessarily precarious.

And, in case any stall or stand shall remain unoccupied during three days consecutively, the lessee of the market shall hold the same abandoned and subject to the demand of any other applicant.

Economides vs. Hinrichs et al., p. 370.

NEW ORLEANS—Continued.

Holders of floating debt certificates are not entitled to recover money judgments against the city therefor.

Abascal vs. City, p. 565.

STREET RAILWAY.

The respondent having acquired from the city of New Orleans a franchise entitling it to construct, operate and maintain a line of street railway through certain designated streets of the city, the adjudication of which contained the stipulation that all the streets through which its tracks are laid shall be maintained in first-class order between the tracks and two feet on each side of said tracks: *Held*, that this covenant does not impose the additional duty of elevating the entire surface of the street on either side of its track to the height of its roadbed.

State ex rel. City vs. Traction Company, p. 567.

REGULATING DRINKING SALOONS.

An ordinance of the city of New Orleans which provides that no one shall open or establish a drinking house or establishment for the retail of spirituous liquors without first obtaining a license or permit from the City Council is not illegal nor unconstitutional, as it comes within the police power of the city.

State vs. Mattie, p. 728.

The court again affirms the conditions of transfers of claims against the city of New Orleans for payment out of budgeted appropriations, prescribed by previous decisions. 42 An. 164; 43 An. 78; 46 An. 545.

Creditors of the city claiming payment under appropriations of an amended budget have no exclusive rights of payment from the revenues placed on such budget. Acts 1877, Extra Session, No. 30, Sec. 3; Act No. 20 of 1882, Sec. 66; Act No. 88 of 1884; No. 109 of 1886; 36 An. 938.

The court again affirms that the items on the original budget have the right of priority of payment over creditors claiming under the original budget. *Ibid*.

And it is again affirmed that the parties seeking payment from budgeted appropriations are restricted to such appropriations,

NEW ORLEANS—*Continued.*

and have no action against the city until there are funds to the credit of such appropriations. 46 An. 545, and cases there cited.

Wadsworth vs. City, p. 886.

Act No. 142 of 1894 does not expressly or by implication repeal Sec. 21 of Act No. 20 of 1882 (charter of the city of New Orleans), in regard to contracts for public works.

State ex rel. Paving Co. vs. City et al., p. 643.

The city of New Orleans has not only the power to recede from their announced intention of having the streets paved, but after the reception of bids it has the unquestionable right to reject any and all bids.

Id., p. 644.

STREETS.

The City Council of New Orleans, in its discretion, can provide for the paving or the repairing of any street in the city of New Orleans.

The city is not compelled to return to the property holders the value of the old pavement which has been replaced.

The City Council, in locating a street railway, has the right to designate what part of the street it is permitted to occupy.

Schmitt et als. vs. City, p. 1440.

HOURS OF LABOR.

The City Council of New Orleans has the right to designate the number of hours in which laborers and mechanics shall work on the public works of the city; but the City Council has not got the power to make the violation of an ordinance, regulating the number of hours in which laborers and mechanics shall be employed in the public works belonging to the city, a misdemeanor, as this is an indictable offence, one which the General Assembly alone can create.

State vs. McNally, p. 1450.

SALE OF FRANCHISE FOR STREET RAILROAD.

The General Assembly did not intend to use the words "street railroad," in Act 185 of 1888, in any narrow or technical sense; its evident purpose was to compel the city of New Orleans to make

NEW ORLEANS—Continued.

available for city purposes, and for the public benefit, in money, any local railroad franchise or privilege which was valuable, and the amount to be derived from the granting of which was likely to be increased by being put up at public auction.

In *East Louisiana Railroad vs. City of New Orleans*, 46 An. 526, this court held that the Act 185 of 1888 did not apply to railroads carrying the mails and transporting freight and passengers long distances beyond the limits of the city; and, besides, the East Louisiana Railroad Company was an existing corporation, having its domicile out of the city of New Orleans, with its legal character and its franchises as a railroad already fixed. The ordinance of the city granted a simple "right of way." It originated in favor of the company no new source of revenue, no change in its business, nor effected and authorized no additional traffic arrangements.

Railroad Co. vs. Watkins, p. 1550.

NEWSPAPERS.

The authorities generally, English and American, hold the editor and publisher of a newspaper to the same rigid responsibility with any other person who makes injurious communications. Malice on his part is conclusively inferred if the communications are not true.

It is no defence that the same have been copied with or without comment from another paper; or that the information upon which an editorial article is based was obtained from the columns of another paper. It is no defence that the source of information was stated at the time of publication, and that the editor or publisher believed it to be true. The freedom of speech and the liberty of the press were designed to secure constitutional immunity for the expression of opinion; but that does not mean unrestrained license, nor does it confer the right upon the editor and proprietor of a newspaper to write or publish whatever he may choose, no matter how false, malicious or injurious it may be, without full responsibility for the damage it may cause.

The modern rule with regard to the conditional privilege which newspaper publications enjoy is, that when the publication is made in good faith, in the ordinary course of the publisher's

NEWSPAPERS—*Continued.*

business, with good motives and for justifiable ends, and without any intention to work injury to the reputation or character of the subject of it, the party injured will be restricted in his recovery to actual damages; but the publisher is liable, not only for the estimated damages to credit and reputation, and such special damages as may appear, but also such damages, on account of injured feelings, as must, unavoidably, be inferred for the publication of such libel.

As the law looks to the *animus* of the proprietor in permitting his columns to be employed for the dissemination of calumny, circumstances may be shown in mitigation of damages.

The instigating circumstances pointed out by the defendants being, that the administration of the government of the city of New Orleans had become so notoriously corrupt that suspicion in the public mind rested alike upon all those in any way connected with it, and urgently demanded investigation and reform, they aver, that as faithful and fearless public journalists, they felt in duty bound to direct public attention to this serious condition of affairs; and, consequently, when Orlopp, an important city contractor, made the disclosures attributed to him in certain other city papers, they deemed it to be the discharge of public duty to make upon them the editorial comment that is complained of. *Held*, that while conceding the principle, the conclusion is denied, in the total absence of a plea of justification and proof of the truthfulness of the specifications in the article contained; for the law is just as studious to protect the reputation and character as it is the property of the citizen, and the public official from unnecessary, unseemly and unwarrantable aspersions upon the management and conduct of his office, through the columns of a newspaper.

While it is undoubtedly true that the preservation of good and pure government, either in city or State, greatly depends upon a free and fearless expression of public sentiment through the columns of the journals of the country, yet it is equally true that same must and can be accomplished through the instrumentality of cogent, temperate and well-reasoned editorials, predicated upon facts, and not by means of hasty, intemperate and opprobrious criticisms and abuse, having no other foundation than the cur-

NEWSPAPERS—*Continued.*

rent local items published in some other paper. This rule, if adhered to, will tend to the promotion of truth, good morals and good government.

Fitzpatrick vs. Daily States, p. 1116.

NEW TRIAL.

An order of the trial court granting a new trial will not be reversed on an appeal by the State.

State vs. Davis, p. 727.

Motions for new trials are universally conceded to rest within the exercise of the sound judicial discretion of trial judges; and same will not be disturbed by an appellate court except in clear cases of abuse or misdiscretion.

State vs. Magee, p. 901.

NOLLE PROSEQUI.

The powers of the District Attorney to enter a *nolle prosequi* are subject to certain limitations.

After the jury has been empaneled and the charge read, he can not discontinue if the defendants insist upon a verdict.

After verdict and refusal to grant a motion for a new trial, he is without authority to dismiss the prosecution without the authority of the court.

After verdict and conviction a pardon may be granted.

State ex rel. Bier vs. Sheriff, p. 140.

SURETY ON BOND.

The surety on a bond is not released by the fact that a *nolle prosequi* was entered on motion of the District Attorney, because of irregularity in finding the indictment. The defendant and his surety were properly held to answer to another indictment returned in lieu of the bad indictment.

State vs. Brooks et als., p. 855.

See District Attorney.

NOVATION.

The debtor's note given for an open account does not necessarily novate the debt.

Chambers, Roy & Co. vs. Knapp, p. 1156.

PAPER IN CIRCULATION—NOTICE OF DEFECT—INQUIRY.

There are circumstances which place the holder of paper in circulation upon inquiry, without direct notice of any infirmity of title.

Hays vs. Lapeyre, p. 749.

EFFECT OF FORMER SUITS—RES ADJUDICATA.

The plaintiff, alleging he is the holder of claims for services of parish officers, witnesses, and jurors' fees, and other items of parochial expenses, the claims duly acknowledged and warrants therefor issued and averred to be entitled to be paid, will be concluded by the judgment dismissing his petition without reservation, from renewing the suit on the claims; it being apparent in the first suit the liability of the parish on the claims and warrants was at issue, that proof was admissible to sustain such liability, and "the thing adjudged" applies to the demand and to all grounds available to sustain the demand. C. C., Arts. 2285, 2286; 2 An. 494; 8 An. 6; 40 An. 646; 94 U. S. 352; 32 An. 898.

Warrants or orders on the parish treasurer by the police jury without power to issue notes or other similar instruments, avail as acknowledgments to interrupt prescription, but do not change the character of the debts for which the warrants issued or the prescription applicable to such debts.

Flagg vs. Parish of St. Charles, p. 765.

PARTITION.

Persons owning undivided interests in property may merge their interests so as to facilitate a division in kind. The judge, however, must decide whether this merger of interests will permit a division in kind without loss or great inconvenience to the other co-proprietors.

Parties to a partition have the right to insist that the property shall be viewed in its existing physical condition, and if it presents insurmountable objections to a partition in kind, the consent of some of the owners that they will relinquish all advantages which might accrue from the peculiar condition of the property, or be willing to make restitution for parts falling to others for inconvenience to them, can not compel the other owners to consent to a division in kind.

Soniat vs. Supple et als., p. 296.

PARTITION—Continued.

Where parties to a partition proceeding, although it was not definitely closed, have acquiesced in it for nearly thirty years, the heirs of the original parties to the suit can not revive it and continue the partition proceeding.

If the proceedings show that the defendant in the suit has a claim against plaintiffs on final settlement, and he made no demand for it in having it judicially recognized, and he died many years after, in the suit by plaintiffs to continue the partition the claim of the heir of defendant in reconvention for said amount will not be allowed, for the reason the long silence of defendant presumes an abandonment of the claim.

The case was remanded for liquidation and partition under instructions of the court as to certain items and reservation as to others. As to one of the items it was not contested, but admitted. In partition proceedings it is not excluded from the partition.

The inventory taken after the case had been remanded, not questioned as to its correctness, is *prima facie* evidence in support of that item.

To the extent and amount that the defendant was a creditor and debtor, by operation of law one extinguished the other, and there was no prescription.

Prescription applies to the remaining balance unclaimed since many years, and to all appearances treated as a balance after partition.

Johns et al. vs. Race, p. 1170.

PARTNERSHIP—COMMERCIAL.

The managing partner of a commercial partnership has no authority, without the consent of the other members of the partnership, to assume the debt of a third party, and bind the partnership to its payment.

Sentell & Co. vs. Rives et als., p. 1214.

PARTY WALL—NEW BUILDING.

In demolishing the old and building the new party wall, under the conditions fully proved in this case, the plaintiffs exercised an absolute right conferred upon them by the law. Under the maxim, "*Neminem lædit qui jure suo utitur*," they were not bound to indemnify their neighbor for any inconvenience or injury

PARTY WALL—Continued.

necessarily occasioned by the exercise of the right. Such a work must necessarily incommode the neighbor. It can not be prosecuted without an entry upon and partial occupation of his premises. It must disturb his enjoyment and that of his tenants. It may give ground for the annulment of his leases or for diminution of rents. It may prevent the renting of his property. It may injure him in many ways. But so long and in so far as these injuries are inseparable from the exercise of the right, the neighbor is bound to submit to them and can claim no indemnity therefor.

But, on the other hand, plaintiffs are responsible for any exaggeration of these necessary damages, which, by any diligence, they could have prevented. They were bound by every means in their power to reduce to a *minimum* the injury and inconvenience occasioned to their neighbor; to occupy his property to the least extent and for the shortest time consistent with the exercise of their right, and to hasten by all practical means the completion of the wall and the restoration of the neighbor to the full enjoyment of his property: They were, moreover, bound, at their peril, to replace the neighbor at the end of the work in a position equal in every respect to that which he occupied in the beginning and to furnish him with a wall fit and adequate to support his building without injury.

Levy vs. Fenner et al., p. 1389.

PATENTS TO PUBLIC LANDS—CONFLICTING.

See *Conflicting Patents to Public Lands*, page 1612.

PAYMENTS—WITHDRAWAL OF CONSIDERATION—RETURN OF MONEY.

When a party has been induced to make a payment of money for a consideration the withdrawing or withholding that consideration entitles the party making the payment to a return of his money.

Insurance Company vs. McLain, p. 1091.

PENDENTE LITE.

The article of the Code forbidding alienation of the property pending the suit has no application to a valid mortgage created before the suit is brought, or to a sale under that pre-existing mortgage. C. C., Art. 2459; Act No. 3 of 1878.

PENDENTE LITE—Continued.

Nor can the judgment in said suit be pleaded as *res judicata* against such mortgage creditor no party to the suit. C. C., Art. 2286.

Lacassagne vs. Abraham, p. 1180.

PEREMPTORY EXCEPTION—IN SUMMARY MATTERS.

On rule to show cause when relator's demand is first met by a peremptory exception and such exception is overruled, the respondent is not thereby debarred from any further defence on the merits of the application.

The court, in its discretion, will prevent any improper advantage being taken by filing the exception separately from the answer; this was done in *Shaw vs. Howell*, 18 An. 195, when dilatory exceptions were presented evidently for delay.

A respondent in court on a rule to show cause invoked by the relator has the right to be heard on the defences which he may urge, subject to the legal test as to whether they are such as he could legally raise. *Rouge vs. Lafargue Co., Lim.*, 47 An. 1649; *Ex rel. Morris vs. Secretary*, 43 An. 680, 681.

Oil Co. vs. Assessor, p. 1351.

PERSONAL SERVICES—WHEN DUE OUT OF ESTATE OF DECEASED.

Where services are rendered of a valuable nature in the expectation of being remunerated in the will of the person to whom they are rendered, and an implied promise to that effect has been held out to the party performing the same, and he is not mentioned in the will, he will be entitled to reasonable compensation out of the estate of the deceased.

Succession of McNamara, p. 45.

PERSONAL LIABILITY—NOT TO BE AVOIDED.

The personal liability arising out of the act of converting another's property (or property on which he has a lien) can not be avoided and frustrated by the fact itself of the conversion.

Hewitt et als. and Bank vs. Williams et al., p. 686.

PLEADING—PETITORY ACTION.

Plaintiff in a petitory action, who declares upon a particularly specified title, is confined to that title on the trial.

West vs. Negrotto, p. 922.

PLEADING AND PRACTICE—ACTION OF NULLITY.

An action of nullity against a judgment does not lie upon a general allegation that it was rendered contrary to law and evidence. Where an appeal is the proper remedy for the correction of a judgment an action of nullity can not be substituted therefor.

Landry et als. vs. Succession of Landry, p. 48.

EXCEPTIONS.

The rule that, upon the trial of an exception of no cause of action, the allegations of the petition are to be taken for true does not extend to conclusions of law nor to matters of evidence pleaded in the petition.

An individual citizen complained to certain public officials of the non-performance of duty by a corporation which, under a conventional contract, was acting as a public agency. He had reason to believe the officers addressed had supervisory control over the corporation's acts. The contract affected separately, both by way of right and obligation, individual citizens. The corporation brought an action for libel against the complaining citizen for language used in the complaint. *Held*: As the language contained in a complaint so made could hardly occasion injury against a corporation so engaged under a contract conferring upon them vested rights, the allegation of plaintiff's petition should show the existence of facts from which injury could rise.

Fertilizing Co. vs. Wolf & Son, p. 68.

ABSENCE OF COUNSEL.

The ruling of the District Judge declining to grant a continuance when associate counsel is present, on account of the absence of leading counsel engaged in professional business elsewhere, will not be disturbed.

Johnson vs. Dean et als., p. 100.

Having objected to the testimony on the ground that it was not admissible under the plea of general denial, the plaintiff waived the objection by obtaining time to rebut the testimony admitted.

Cockerham vs. Perot, p. 209.

PLEADING AND PRACTICE—Continued.

The allegations in a supplemental petition, though filed after the exception of no cause of action, may be considered in determining the exception.

Goldman et al. vs. Insurance Co., p. 228.

STATEMENT OF FACTS.

- When there are two statements of facts by the judge of the lower court filed in this court, and there is a dispute between the parties to the appeal in reference to the statement on which the decision is to be based, the case, under the circumstances shown by the record, will be remanded to enable the appellant to obtain a statement in the mode pointed out by the Code. Code of Practice, Arts. 602, 603.

Town of Mansfield vs. Baudot, p. 248.

RIGHT TO DISCONTINUE SUIT.

The plaintiff may, in every stage of the suit previous to judgment being rendered, discontinue his suit on paying the costs. This rule is subject, however, to some exceptions, as, for instance, after the case has gone to trial and evidence has been adduced, the judge can exercise his discretion as to the kind of judgment he shall enter; when an intervenor prays for the dissolution of the plaintiff's injunction and damages; when a defendant has set up in his answer a reconventional demand; when the rights of the plaintiff in suit shall have been seized on execution by a third party.

Aside from such exceptions as the foregoing, the rule is absolute.

State ex rel. Administrator vs. Judge, p. 455.

The rule that, upon the trial of an exception of no cause of action, the allegations of the petition are to be taken for true does not extend to conclusions of law, nor to matters of evidence pleaded in the petition.

Fertilizing Co. vs. Wolf & Son, p. 631.

RECONVENTIONAL DEMAND.

Where a plaintiff in reconvention sets up title and claims possession, and the defendant in the reconventional demand answers the intervention, denying ownership and possession, these latter

PLEADING AND PRACTICE—*Continued.*

demands are eliminated from the suit, and the only matter in dispute is the amount of rent claimed from the defendant while in possession.

Kenner vs. Weill et als., p. 805.

POLICE JURIES—POWERS OF.

A contract made by the police jury, in which payments for a court house are provided for in instalments, is not a bond, promissory note, warrant, for the issuance of which Act 80 of 1877 and the organic law prohibit. A police jury has the authority to appropriate the excess of the current expenses of the parish, within the ten mills limit, for the purpose of building a court house, and can set apart the excess in advance, for future collection, to pay the instalments due, as expressed in the contract.

Railroad Company vs. Police Jury, p. 331.

POSSESSION.

A declaration that one has never been divested of his *ownership* and *possession* may be true as a legal proposition and conclusion of law, as to his *ownership*, and yet not true from that standpoint as to his *possession*. O. C., Arts. 496, 8484, 8485.

Ownership may remain in the original owner and the *possession* both actual, civil or constructive, be lost to him. Possession being the less important right is more easily lost than ownership.

Parties advancing claims, in determining which questions of possession enter as a factor in their favor, are called on to make a much stronger showing as against persons in actual possession of property under claims of ownership than they are against those same parties urging the same claim of ownership while entirely out of possession.

A plaintiff not in possession can not force a defendant in possession to assume the attitude of a plaintiff in a petitory action; such defendant has a right to stand on his possession.

When a plaintiff, so far from calling the defendant to set up title and justify under it, selects for himself certain transfers as being those under which defendant holds, and asks that the defendant be prohibited from setting up those particular transfers, the action will be held as a disguised personal action of nullity

POSSESSION—*Continued.*

directed against a specifically named chain of title, and barred by ten, if not by three or five years' prescription.

Michel et al. vs. Stream, p. 341.

When a plaintiff has been successful in a possessory action and the defendant appeals therefrom, the appeal will not be dismissed because the defendant since his appeal has resorted to the petitory action—the bringing of such a suit does not amount to a voluntary execution of the judgment appealed from nor abandonment thereof.

The judgment in a petitory action carries with it both the instant right to the possession of the property and the title to the same. If the plaintiff in such action permits a party, a stranger to the litigation, who purchased the property during the pendency of the suit, to remain in possession for more than a year, peaceably and uninterruptedly, his possession must be protected.

Vigo vs. Administrator, p. 665.

PRESCRIPTION.

An amount received as agent not subject to a prescription of less than ten years.

Succession of Birba, p. 655.

The payment of taxes on property is not by itself evidence of corporeal possession of the property, and without some act showing corporeal possession will not support the plea of ten years' prescription.

Possession *animo domini* forms the basis of the ten and thirty years' prescription, and it must be, at least in the commencement, a corporeal possession.

The corporeal possession is regulated to a great extent by the uses for which the immovable property is destined and its nature.

Chamberlain et als. vs. Abadie, p. 587.

See Criminal Law.

The judge has no authority to supply the plea of prescription, which must be specially pleaded by the defendant.

The case of *Abraham Stein vs. Lazarus Bruner*, 42 An. 772, affirmed.

State ex rel. Watkins vs. Justice, p. 1538.

See Tax Sales.

PRESUMPTION OF PAYMENT.

Recognizing his indebtedness to his children on account of their residuary claims as heirs of their deceased mother for a share in the community, the father directed a sum of money largely in excess thereof to be, by his commission merchant, transferred to their account, without designating the purpose for so doing: *Held*, that the first presumption of law is, that a payment of said indebtedness was intended, and was thereby accomplished.

Succession of Hymel, p. 737.

PRINCIPAL AND AGENT.

If the principal undertakes to make the act of his agent his own, the ratification should be timely and established beyond question as against the other contracting party.

Cockerham vs. Perot, p. 209.

Where a demand is made upon an agent to account for the rents and revenues of property under his administration, the judgment prayed for being only for the amount as shown by the account, the proper course to pursue when the answer of the defendant denies that he owes an accounting to plaintiff is to ascertain the fact whether an account is due, and if so to order the defendant to file an account within a fixed time, to which the plaintiff may, if he chooses to do so, file an opposition.

Lillie vs. Lillie et al., p. 726.

PROBABLE CAUSE.

Probable cause means the existence of such facts and circumstances as would excite the belief, in a reasonable mind, that the plaintiff was guilty of the offence for which he was prosecuted.

Rumors are not, but the representations of others, and the conduct of the plaintiff inviting suspicion to himself, is a foundation for such belief.

In order to recover plaintiff must show a total absence of probable cause, the presumption of which exists until the plaintiff can show the contrary.

Mosley vs. Yearwood et al., p. 834.

Promissory Notes—See Endorser.

PROHIBITION.

This court will not grant the writ of prohibition to restrain the Criminal District Court from proceeding on an information against the relator when the record on which the application for the writ is based shows only the information charging an offence within the jurisdiction of the Criminal District Court, and a demurrer to the information. Constitution, Art. 90; Code of Practice, Arts. 845 *et seq.* *State ex rel. Voegtle vs. Judge*, p. 1372.

PROMISSORY NOTES—EQUITIES.

Where plaintiff brings suit, as the holder and owner of a promissory note, against the maker, and is met by equities set up by defendant as existing between himself and the original holder, coupled with averments charging the plaintiff with knowledge of the same, and denying his good faith, he is entitled to repel the attack and show the date of his original connection with the note and the tenure under which he held it.

McPherson vs. Boudreau, p. 431.

PROOFS—RECORDS OF FOREIGN COUNTRIES.

Ordinarily the entries in registers duly made, kept by one bound to record the fact in a foreign country, makes proof when authenticated by the consular officer at the place.

The certificates were of birth, marriage and death, and as such were admissible in evidence. *Succession of Justus*, p. 1096.

PROVISIONAL SEIZURE—AFFIDAVIT.

It appearing that an affidavit for the granting of a provisional seizure is wanting the signature of the officer before whom it was made, same will not be treated as null and void, if it be immediately succeeded by an order for the issuance of the writ, which is signed by the judge. For in thus granting the order the judge manifestly acted upon the faith of the proper oath having been administered.

If subsequent to the filing of a motion to dissolve the writ the judge should cause the blank space in the jurat to be filled out, *nunc pro tunc*, it would have the effect of merely causing the record to conform to the truth, the plaintiff having been actually and really sworn to the affidavit in the first instance, and the name not appearing as having been thereto signed.

State ex rel. Singreen vs. Judge, p. 1420.

QUASI-CONTRACT—RETURN OF PRICE.

In a *quasi-contract*, where the original contract is not at issue, to return the price of the sale of a thing which the seller has not delivered, Art. 2276 of the Civil Code does not apply. One witness is sufficient to establish the non-delivery of the thing sold.

Insurance Company vs. Hart, p. 582.

RAILROADS—APPLIANCES IN COMMON USE; BURDEN OF PROOF.

Railroads using appliances in common use, which have been used for a long time and found sufficient to protect their own and other property from danger, would be protected against the charge of negligence, because of its use. If such appliances are used the burden of proof is on plaintiff to show they were defective or improperly and negligently used.

Gumbel vs. Illinois Central Railroad, p. 1180.

RECORD.

A petition is part of the record, when it is delivered to the proper officer, in his office, and it is by him received to be kept on file.

Pottery Company vs. Levi & Co., p. 777.

RECORDER'S COURT—CITY CHARTER.

Act No. 45 of 1896 does not disturb the jurisdiction of the Sixth Recorder's Court as established by Act 154 of 1894, and will not do so until the next election for city officers, as provided by Sec. 112 of Act 45 of 1896.

State ex rel. Holsom vs. Recorder, p. 1384.

POWERS OF.

The record of respondent's court disclosing that relators had been committed to the parish prison for a period of two thousand one hundred and sixty days, in default of their making payment of fines aggregating seven hundred and twenty dollars in amount for each and costs of prosecution, for violation of a city ordinance in committing a trespass upon one of the public parks of the city of New Orleans; and it further appearing therefrom that, upon essentially one complaint, the respondent has found them guilty of seventy-two distinct violations of one ordinance within one hour and forty minutes, each one of said offences

RECORDER'S COURT—*Continued.*

succeeding the other, only one and one-half minutes intervening between the commencement of any two of them. *Held:* That such a penalty is an unusual and unreasonable punishment in the sense of the Constitution.

State ex rel. Garvey et als. vs. Whitaker, Recorder, et al., p. 527.

REHEARINGS—DELAYS FOR.

Under Art. 103 of the Constitution, the Court of Appeals must allow three judicial days in which applications for rehearings may be filed in accordance with Act 18 of 1879.

Ex rel. Davis vs. Judge, p. 1079.

RES ADJUDICATA.

The judgment pending the devolutive appeal decreeing that plaintiff in such execution must credit his debt with the amount derived from such sheriff's sale will not be *res adjudicata* as to the value of the property, against the defendant in execution in the suit brought by him for damages after the reversal of the judgment under which his property has been sold. Civil Code, Art. 2286; 3 M. 483; 3 N. S. 409; 7 N. S. 28.

Fush vs. Egan, Jr., et al., p. 60.

RES JUDICATA.

The judgment pleaded as *res judicata* declared that the *dation* could not take effect to the prejudice of the plaintiff's debt before the court for adjudication; that is the matured debt. The judgment could not deal with the notes not matured and the privilege by which they were secured. A judgment on a plea of prematurity is no support for the plea of *res judicata*.

Hewitt et als. and Bank vs. Williams et al., p. 687.

The reasoning of the court is no part of the decree, and when the decree is ambiguous or conflicting in its terms, consistently with the authority the law attributes to *res judicata*, the court may construe the decree so as to reconcile repugnancy in its expressions and make it effective.

Police Jury vs. Police Jury, p. 1299.

RESPITE.

The respite proceedings will not prevent suit and seizure by the privileged creditor. Civil Code, Art. 3095.

Fusk vs. Egan, Jr., et al., p. 60.

The debtor who has failed to comply with the conditions of a contracted voluntary respite (to which the consent of all the creditors was not obtained) can not be driven to a forced surrender.

Ex rel. Marchand vs. Judge, p. 660.

When there is no substantial compliance with the law requiring the debtor seeking a respite from his creditors to file a schedule of his assets sworn to by him, and instead of promptly supplying the deficiencies when called on by his creditors, he fails to comply with the call, the order for the respite should be set aside. Civil Code, Arts. 3087 *et seq.*; Pecquet vs. Golis, 1 Martin, N. S. 488; Phillips vs. Her Creditors, 38 An. 904.

Lay vs. Creditors, p. 1058.

SALES AT PUBLIC AUCTION.

Notwithstanding the proceedings of a family meeting recommending a sale of succession property to pay debts is approved and homologated by the judge, same does not, in any manner, impair the validity of a contemporaneous order for the sale of same property, which is made by the same judge.

It is a well settled principle of jurisprudence, as well as a well recognized rule of property, that a purchaser at a sale made at public auction, in pursuance of an order of court, is not bound to look beyond the decree in order to ascertain its necessity.

He is bound to ascertain that the court had jurisdiction to grant the order; but finding that it has, the truth of the record, in other respects, may be assumed.

Munday vs. Kaufman, p. 591.

SALE—REDUCTION OF PRICE.

The articles of the Code that give to the buyer the right to claim a reduction of the price when the thing sold, though not of the character required by the contract, is susceptible of use, can not be extended so as to compel the party who has contracted for a filtering plant of fixed capacity as to quality, quantity and

SALE—Continued.

in other respects, to pay some part of the price for a plant not capable of accomplishing the purposes specified in the contract.

O. C., Arts. 2541 *et seq.*

Purifying Company vs. Waterworks Company, p. 773.

DECLARATION IN ACT.

Where, in an act, a vendor declares that he sells the property with full warranty without a word of reservation, exception or limitation, a clause at the very close of the act which declares "In trust that said premises shall be used and kept, maintained, and disposed of as a place of divine worship, for the use of the ministry and membership of the Colored Episcopal church in America, subject to the discipline, usage and ministerial appointments of said church, or from time to time authorized and declared by the general conference of said church, and the annual conference within whose bounds the said premises are situated," is no part of the contract between the vendor and his vendee; it is an enunciation foreign to the disposal of the property, in which vendor who had parted absolutely with his entire interest had no concern. It is merely a clause declaratory of the object for which the purchase was made.

Board of Trustees vs. Campbell, p. 1543.

If an act of sale for, at least, some consideration was not passed to defraud creditors with whom it was proposed to contract later, the subsequent contractors have no right to have it annulled.

Unter vs. Bank, p. 238.

Only in a very clear case, the vendor of a defective machine, who has sold it for a consideration equal to the price paid by him, is entitled to recover a claim for asserted defects.

Ice Machine Co. vs. McDonald, p. 451.

See Warranty.

SEPARATION FROM BED AND BOARD.

A judgment of separation *a mensa et thoro* does not warrant a judgment of divorce *a vinculo*, on the petition of one against whom it was obtained, if the spouse in whose favor the judgment of

SEPARATION FROM BED AND BOARD—Continued.

separation from bed and board was pronounced pleads in defence of the suit willingness to become reconciled.

Mazerat vs. His Wife, p. 824.

A reconciliation between husband and wife, after the facts which might have authorized a suit for separation, is a bar to such action.

O'Grady vs. Larkin, p. 853.

A plaintiff whose demand for a separation from bed and board from his wife fails for want of evidence, is not authorized to pass into the discontinued reconventional demand of the wife herself for a separation and make an allegation therein that she would never return to or be reconciled to her husband, the basis for a judgment in his favor.

Thos. Anderson vs. His Wife, p. 642.

The utterances of a wife to a confidential friend while seeking sympathy and advice and when smarting under what she reasonably considered to be wrongs received at the hands of her husband by neglect of herself and indiscreet, injudicious and excessive, if not criminal, attentions to some other woman, will not be held to be "public defamation."

The husband alleging "public defamation" demands separation from bed and board; the wife reconvenes and claims a separation on the grounds of abandonment. *Held*: When the husband fails, the demand of the wife in reconvention will also be dismissed. It would be against the policy of the law that the husband should find himself confronted by a judgment of separation from bed and board in favor of his wife on account of abandonment, based upon neglect or refusal to return upon summons made, when the propriety of his own course and the conduct of his wife was at the time being made the subject of judicial investigation.

The letters of the husband to the wife are admissible in evidence in a suit between the parties for a separation from bed and board. The husband is not, through such letters, made to be either a witness for himself or against his wife. The letters are used in evidence as containing matters emanating from the husband to break down his cause of action. Any act of the plaintiff hus-

SEPARATION FROM BED AND BOARD—Continued.

band or admission made by him which would estop him, throw his demand out of court or show his demand not well founded, the defendant wife is entitled to prove, and she is not cut off from doing so by the circumstances that the fact is shown through a letter written by the plaintiff husband.

Ashton vs. His Wife, p. 1194.

See Alimony.

SEPULCHRE—RIGHT OF.

The tomb owner is without right to cause the removal of the remains of the dead transferred from the places of sepulchre first selected by the surviving relatives and deposited by him in the tomb under his assurance, accepted by such relatives and on the faith of which they permitted the transfer, that the remains should rest forever in the tomb.

Choppin et al. vs. Dauphin et als., p. 1217.

SERVITUDE.

It is the servitude of the lower estate to receive and dispose of the water that flows naturally from the estate above, and no obstruction to that flow can be created by the proprietor of the lower estate. Civil Code, Arts. 660, 661; 19 La. 351; 16 La. 151.

If such obstruction is created the proprietor of the lower estate will be liable for the damage. *Ibid.*

The abandonment of the legal servitude of drain imposed on the lower for the benefit of the upper estate is not to be presumed, but requires clear proof; the court finds no such proof in this case.

Foley vs. Godchaux, p. 466.

SPECIFIC PERFORMANCE.

In decreeing specific performance this court will be guided by that respect for individual liberty which is an ennobling characteristic of our remedial system. 35 An. 1182. So this court will not compel a party to sign an authentic act or notes; the remedy is on the contract for damages.

Laroussini vs. Werlein, p. 13.

STEP-DAUGHTER.

The step-daughter is not bound by ties of consanguinity to render her step-father gratuitous services as a nurse and attendant during illness and decrepitude; but for such services she is entitled to compensation.

In case the evidence fairly supports the demand and no countervailing evidence was offered at the trial, this court will not reverse the finding of the District Judge.

Succession of Stuart, p. 1484.

STREET RAILWAY—TRACKS IN COMMON.

In order to authorize one street railway company to occupy the tracks of another there must be legislative permission for the same, or it must result from such necessary implication from the grant that the abandonment of the grant would necessarily result from the non-occupancy of the road bed of the street railway first occupying the street.

Railroad Co. vs. Railroad Co., p. 856.

SUNDAY LAW—PRIVATE CLUBS.

The statute requires that stores, shops, groceries, saloons be closed on Sundays. This includes defendant's corporation.

Bona fide social clubs, are under the terms of the acts of incorporation, properly private and not exposed to the intrusion of any one.

If there is as an incident a place set aside, selected for social enjoyment and refreshments, as in the case here, it comes within the prohibition. Social clubs, such as defendant's, are places of enjoyment, pleasure and improvement. The statute excepts places of amusement with a *proviso*, which excludes the defendant club from the benefit of the exception.

State vs. Gelpi, p. 520.

SYNDIC—COMMISSIONS OF.

The provisional syndic is entitled, for his trouble and services, to one per cent. on the appraised value of the property.

The syndic is entitled to a commission on the proceeds of the sale of the mortgaged property, though purchased by the mortgagee, who retained the price in satisfaction of his mortgage.

Delogny vs. Creditors, p. 488.

SHERIFFS—RIGHT TO MAKE DISBURSEMENTS.

Where a canal company which under authority of the police jury had been permitted to cut the public levee in front of the canal in order to make connection with the Mississippi river, permitted the locks and gates of the canal to get into such bad condition as to threaten the community with a crevasse, and the property in that condition passed into the custody of a sheriff under writs of attachment, the legal duty was not thrown upon him even had he legal authority so to do, to close primarily, at his own expense, the mouth of the canal by a dam or levee, for the reason that it might be deemed necessary that this should be done for the protection of the property in his charge.

The expenditures of a sheriff which are taxable as costs of suits are those incurred by him in the performance of obligations cast on him by the law itself.

Even if a police jury which had authorized by ordinance the cutting of a public levee in front of a canal in order to enable its owners to connect with the Mississippi river had the right to repeal its ordinance and construct or have constructed a dam across the mouth of the canal at the expense of the owners (a point not decided) by reason of the condition of the locks and gates threatening the community with a crevasse, a claim for the payment of the construction of the levee could not be made to prime the rights of a creditor holding a mortgage on the canal at the time of the work, unless the claim or contract had been registered according to law. The claim for reimbursement would not prime that of the mortgage creditor, because the person who constructed such dam or levee was the sheriff of the parish holding the property in his possession under writs of attachment, and because the work was done by him by direction of the police jury and under an *ex parte* order of and authority from the District Judge to make the disbursement for account of the owners.

Wheelwright vs. Canal and Transportation Co., p. 606.

SLANDER.

No man may disparage the reputation of another. Every man has a right to have his good name maintained unimpaired. His right is a *jus in rem*; a right that is absolute and good against the world.

SLANDER—Continued.

Words which produce any perceptible injury to the reputation of another, are defamatory, and, if false, are actionable.

Every repetition of a slander originated by a third person is a wilful publication of it, rendering the person so repeating it liable to an action in damages for slander and defamation of character.

"Tale-bearers are as bad as tale-makers." And it is no defence that the speaker did not originate the scandal, but repeated what he had heard from another, even as a rumor, and he, in good faith, believed it to be true. Nor is it any defence that such person gave the name of the author.

Harris vs. Minvielle, p. 908.

Slandorous epithets are not always actionable. An exception to the general rule is found in the case of a single woman, eighty years of age, suffering from a real or fancied wrong, who makes use of vile epithets as a means of defence. The damages occasioned thereby are more seeming than real, and the cause of action may be appropriately relegated to the domain of *damnum absque injuria*.

Mihejovich vs. Bodechtel, p. 615.

SUCCESSION.

See Administration—Executor.

SUPREME COURT—EFFECT OF DECREE OF.

Where, after the Supreme Court, in a *mandamus* proceeding, directed against the Common Council of a municipal corporation, has remanded the case, with instructions to it "to levy a tax in favor of relator upon an assessment upon the tax rolls of 1889, but in case the limit of taxation had been reached during that year, or there should be any other reason why the full amount of the tax so ordered assessed could not be assessed and collected on the rolls of that year, that the tax should be levied on the rolls of 1894"—the Common Council under the decree passed an ordinance directing the collection of the tax upon the roll of 1894, and set on foot the execution of its ordinance through the tax collector of the town—it can not of its own motion, on the ground that it acted in error, repeal the ordi-

SUPREME COURT—*Continued.*

nance and check the collection of the tax by the tax collector, though it simultaneously passes an ordinance directing the collection of the tax upon the assessment roll of 1889.

The decree did not send the case back for the exercise of any original right in the Common Council, but for the performance of specially imposed duty. Both its right and its duty in respect to the matter for which the cause was remanded went no further than the decree, which was at once the source and measure of its right and duty. In taking action the Council was not acting in the course of its ordinary functions as a common council, but as a special agency selected by the court to do a particular act.

State ex rel. Construction Company vs. Tax Collector, p. 28.

The Supreme Court has supervision and control over the execution of its own judgment. If the original action taken by the Council had not been, in the opinion of the court, in conformity to its decree, it would, by *supersedeas*, have set the Council right. *Cox's Executors vs. Thomas*, 11 La. 369; *Lovelace vs. Taylor*, 6 Rob. 92. And so long after that first action was taken, as it received no instructions to change it, the Council was powerless of itself to do so. It has no legal interest in the matter further than to comply with the order of court.

Id., p. 29.

JURISDICTION.

Where a political corporation imposes a license tax, and the existence of the corporation is denied, the legality of the tax is in dispute and this court has exclusive appellate jurisdiction of the case. In the answer of the defendant, wherein the legality of and constitutionality of the tax is attacked, and an exception as to the existence of the capacity of the party plaintiff to sue is maintained, the appeal from the judgment must be to the Supreme Court. An appeal can not ascend, by fractions, from an inferior, to an intermediate and to a higher tribunal.

State ex rel. Perilloux vs. Judge, p. 506.

EXECUTION OF DECREE OF.

This court has the power to inquire into the proper execution of its decrees, and if the court to which the decree has been sent for

SUPREME COURT—Continued.

execution improperly interprets it, and causes an execution to issue not in accordance with the recitals of the decree, the appellate court can, on proper proceedings being invoked, restrain the improper execution of the decree. When property in the hands of third persons is seized as the property of defendant in execution he can not interpose the adverse possession as a means of defeating the seizure.

State ex rel. Presby et als. vs. Judge, p. 667.

SUPERVISORY JURISDICTION.

In the exercise of the supervisory jurisdiction of the Supreme Court a *mandamus* will lie to compel the Circuit Court of Appeals to take jurisdiction of a cause when the amount involved does not exceed the upper limit of its jurisdiction.

In a suit when the defendant acknowledges a part of the indebtedness, the test of the jurisdiction of the appellate court is the difference between the amount claimed and the amount acknowledged, as judgment can only be rendered for the balance due. But when the defendant denies liability on the entire demand, and pleads in reconviction an amount exceeding the acknowledged indebtedness, the test of jurisdiction is the amount of the judgment which could be rendered in the case.

When plaintiff prays for a judgment decreeing him absolutely and unconditionally entitled to a certain percentage of all crops to be raised by the defendant, who is a tobacco grower by occupation, for a period of nine years to come, an estimate of the amount or value of this claim must necessarily be made by the court in passing upon the question of jurisdiction *vel non*, and this estimate must necessarily be based upon past crops, independently of possible future contingencies, which it is impossible to anticipate.

State ex rel. Beauvais vs. Judges, p. 672.

Where an inferior court acts within the bound of its jurisdiction, and there are no marked defects or irregularities in its proceedings, the Supreme Court, under its supervisory jurisdiction, will not annul the judgment rendered in the case, though it may be contrary to the law and the evidence.

State ex rel. Louque vs. Judge, p. 292.

SUPREME COURT—Continued.

INTERPRETATION OF ITS JUDGMENTS.

When the issue between the parties is the interpretation properly to be given to and the effect properly to follow from one of its own opinions and the District Court refuses to decide, the Supreme Court, so as to set matters at rest, will consider on application for writ of *mandamus* the case as one properly referred to it for immediate action. *Ex rel. Construction Company vs. Tax Collector*, 48 An. 28.

Ex rel. Evans vs. Judge, p. 926.

JURISDICTION OF—MOTION TO DISMISS.

Where a vendor holding eight notes of six hundred dollars each, secured by special mortgage and vendor's privilege, claiming that a third possessor of the property had assumed payment of the notes, proceeds directly against him, praying for a personal judgment for the amount of two matured notes, asking for recognition of the mortgage as securing all the notes and for a sale for cash to satisfy the amount due, and on terms of credit to correspond with the unmatured instalments, defendant against whom judgment has been rendered in conformity to the prayer, is entitled to an appeal to the Supreme Court when he denied in the lower court the existence of the *assumpsit* declared on.

A judgment in favor of plaintiff on the issue raised would be *res judicata* against the defendants as to the existence of the whole *assumpsit*.

Vinet, Executor, vs. Bres & Richardson, p. 1254.

WRITS DIRECTED TO LOWER COURT.

The District Court issued a final injunction restraining and prohibiting before they had qualified appointees of the Governor from exercising the duties of the offices to which they had been appointed. The parties enjoined applied to and obtained from the Supreme Court writs of prohibition and *certiorari* prohibiting the District Judge from further action in the premises.

Held: It was the duty of the judge to obey. If the effect of the writs issued by the Supreme Court was to maintain the *status in quo* as fixed by the issuance of the writ of injunction by the District

SUPREME COURT—Continued.

Court—any violation of the writ which either the District Judge or the District Attorney might deem a contempt should be called to the attention of the Supreme Court; if under the circumstances any contempt had been committed, it was of the authority of the Supreme Court, not the District Court. So, where the District Judge, under such conditions, punishes parties as for a contempt of his authority by disobeying the writ of injunction, the judge will be held to have been guilty of a contempt of the authority of the Supreme Court.

State ex rel. Saizan vs. Judge, p. 1501.

The object of the writ of prohibition is to prevent further action in a case where jurisdictional power and authority to act are denied; the function of the writ of *certiorari* is to undo matters which had taken such shape as not to be remedied by the writ of prohibition; the writ of *certiorari* is a substantive and far-reaching corrective writ, concurrent with and frequently taking the place of the writ of prohibition.

In the exercise of its supervisory jurisdiction the Supreme Court is not rigidly tied down to form; when the facts of a given case, being recited, present a case for relief under its supervisory jurisdiction and the prayer is for such orders and decrees as those facts will justify and for general relief, the Supreme Court will not remit the relator to new, expensive, unnecessary and sometimes fruitless remedies, simply by reason of a mistake in the writ asked for.

Id., p. 1502.

SURETIES ON OFFICIAL BONDS—ACTION AGAINST.

In a suit against the sureties on an official bond for a failure to account for public or trust funds, it is part of the plaintiff's duties to allege and prove that the defalcation occurred during the term of office covered by the bond.

When the term of office for which an official bond has been given has expired and no second bond exacted, the responsibilities of the sureties on the first bond can not be extended so as to hold them liable for the acts of a next term, for which other sureties on a new bond would have been responsible.

SURETIES ON OFFICIAL BONDS—Continued.

When a deficit is shown to have occurred during a first term of an official and in the funds with which, during that term, he was chargeable, he will not be permitted to apply money, subsequently received by him, to closing up past accounts, thus leaving a deficit at the end of another or second term. The fixed liabilities of sureties can not be lifted from themselves and transferred to others simply by reason of the fact that a new term had commenced with new sureties.

Board of Administrators vs. McKowen and Smith, p. 251.

TAX SALES.

It is again held that adjudications for taxes accrued since the Constitution of 1879 pass no title without the notice given to the owner the Constitution exacts. Art. 210, *Breaux vs. Negrotto*, 43 An. 428; 44 An. 912; 46 An. 360, 418.

Nor will prescription of three or five years cure want of such notice. Act 1874, No. 105, Sec. 5; Civil Code, Art. 3453; R. S., Sec. 2809; *Person vs. O'Neal*, 32 An. 237; *Breaux vs. Negrotto*, 43 An. 428; 46 An. 356.

The plaintiff in the petitory action may, without a direct action, controvert the sufficiency of the tax title pleaded by defendant. Code of Practice, Art. 329; 3 La. 392; 11 An. 546; 47 An. 923.

Tax titles, under the Act No. 82 of 1884, as already held, require for their completion payment by the purchaser of the taxes of 1880 and later years. 42 An. 677; 47 An. 923.

Johnson et al. vs. Martinez, p. 52.

NAMES OF STREETS.

Courts take notice of the streets and the names and locations of the suburbs from time to time brought within the city limits. 1 Greenleaf on Evidence, Sec. 6.

An assessment of street lots by the boundaries derived from the act by which the property was conveyed, through giving the changed names by which two of the boundaries were known at the date of the assessment, and stating the numbers of the lots as they are given in the act, held sufficient to support a tax sale, although the depths of the lots are not correctly stated. *Cooley on Taxation*, Chapter 12; 99 U. S. 443; 20 An. 324.

Poland vs. Dreyfous, p. 83.

TAX SALES—*Continued.*

PRESCRIPTION.

The tax sale was made by the proper officer and evidenced by a deed having no patent defects on the face of the papers; the purchaser was not in bad faith. The title became absolute and perfect by the lapse of ten years.

Heirs of Wykoff vs. Miller, p. 475.

The effect of a failure by a purchaser at a tax sale to pay all taxes due at the time of purchase would be to leave such purchaser without title; but the State would still remain the owner under a prior adjudication to it which legally vested title in itself. So when the original owner of property adjudicated to the State proceeds by a petitory action against the purchaser at tax sale, in possession under a tax collector's deed, his suit will be successfully met by the fact that his title has passed to the State and he can not recover, because of the weakness of title in the tax purchaser.

West vs. Negrotto, p. 922.

The publication required by law in tax sales for collection of delinquent taxes prior to 1880, must conform to legal requirements. Advertisements standing in lieu of notices must present on their face the data necessary to place parties in interest on their guard.

The law contemplates publication under a legal assessment.

When a defendant in a petitory action is evicted from land upon which he has paid taxes he should recover from the plaintiff the taxes paid. 12 An. 536.

A purchaser, being a possessor in good faith, against whom a judgment of eviction has been obtained, is entitled to recover a judgment for such amount of improvements made by him as enured to the benefit of plaintiff. 10 Rob. 178.

Walsh vs. Harang and Husband, p. 984.

See Assessments.

An adjudication of real estate at a public judicial sale, made under and in pursuance of the provisions of Act 82 of 1884, is bound to pay all the taxes due thereon at the time of sale, and which were theretofore assessed under current revenue laws since 1880, and which he had assumed and was legally bound to assume as a part of the purchase price thereof.

TAX SALES—Continued.

But in the absence of any pertinent decision of this court to the contrary at the time such adjudication was made, it was competent for the Circuit Court of the United States, holding sessions in the State of Louisiana and having jurisdiction *in personam* of one of the parties to a litigation involving such an adjudication, to place such interpretation upon the provisions of said legislative act as in its judgment was thought to be legal and just.

And such judgment will be held binding by this court between the parties thereto and their vendees and assigns, notwithstanding it has, in other cases since, put a somewhat different interpretation upon that statute.

Bilgery et als. vs. Land Trust of Indianapolis, p. 890.

When the tax collector sells property for taxes which have been paid the sale is null and void, and the purchaser at said sale acquires no title to the property and can transfer no title to a third party.

Brown, Wife of Dressel, vs. Land Company, p. 1189.

THIRD PERSON—STIPULATION FOR.

Whether a stipulation *pour autrui* has been availed of by the third person for whose advantage same has been made is a question of fact which must be ascertained from contemporaneous and surrounding circumstances, and are not confined to the recitals of the act in which the obligations of the contracting parties are to be found.

Vinet, Executor, vs. Bres & Richardson, p. 1254.

TRESPASS.

A petitory action admits defendant's possession.

In a suit of trespass title is only considered incidentally as fixing the character of the possession. 2 Hennen, Offences and Quasi-offences, II (e 3), No. 4, p. 1057; 4 N. S. 136; 6 L. 559; 2 An. 223; 14 An. 34; 14 An. 732.

A right of action against one as a trespasser is in him who is in possession as owner.

Daigre et al. vs. Levin & Co. et al., p. 414.

TUTOR—COMMUNITY RIGHTS.

The tutor's declaration, in his affidavit, in regard to the date his indebtedness began, does not conclude the minor.

Although the distinct interest of the wife attaches at the dissolution of the marriage, subject to the right to renounce, she can claim nothing until the debts are paid.

She can not sue to cancel a mortgage due by the community.

The property of the community is the common pledge of the creditors.

Neal vs. Lapleine, p. 424.

Under the textual provision of the Civil Code the court holds "that the tutor is bound to give an account of his administration whenever he is ordered to do so by the judge."

And that while the costs are to be paid out of the minor's estate, ordinarily, there is no necessity for very expensive litigation and large bills of costs.

Succession of Unforsake, p. 548.

Where the tutor purchases property at a sale of succession property, provoked by him, in which the minors may have an eventual interest, the final account showing the insolvency of the succession will not estop the minors from bringing suit for the revindication of the property, on the ground that the succession being insolvent they have no interest in the same. The minors being placed on the account by the tutor for the homestead benefit, will not operate as a confession on their part as to absolute insolvency of the succession.

Aronstein et als. vs. Irvine et als., p. 301.

TUTORSHIP.

There is no legal presumption of indebtedness of a certain sum raised against a tutor in favor of his ward, on the clerk's certified abstract of inventory of the latter's property being duly registered in the mortgage office, which is sufficiently cogent to justify a court of justice to base a judgment upon in a partition suit amongst the heirs.

At most it is the commencement of proof.

Emke vs. McDonald et al., p. 781.

TUTORSHIP—Continued.

An *ex parte* waiver of proof of a substantial fact, by the defendant tutor, from which it may be inferred that he consents to the judgment prayed for against his ward, may not be considered by the District Court. It may require that in lieu proof be offered in open court (to sustain the proof waived) on an application to confirm a default.

Aiken vs. Gatlin, p. 877.

WARRANTY.

In an action of warranty, interest on the price can well be held to be balanced by the rent.

A warrantor by a call in warranty and service of defendant's pleadings therein, is advised of the attack made upon the title he had conveyed, and it is his duty to inform himself by inspection of the record of the character of the attack.

The warrantor is not liable for the fees of an attorney employed by the party evicted. 14 An. 826.

Walsh vs. Harang and Husband, p. 984.

A purchaser of property is not concerned with the warranty from vendor to plaintiff, who seeks to compel his vendee to accept title. He can not proceed against the warrantor of his vendor without express subrogation.

Chopin vs. Pollet, p. 1186.

WITNESS.

A witness examined out of court before an officer authorized to receive his depositions, should remain until discharged and he should sign the depositions.

Unter vs. Bank, p. 238.

EXAMINATION OF.

It is not the opinion of the witness solicited, when he is asked to state a fact, which is a conclusion from the other facts which had come under his observation and were within his knowledge.

Where a witness is recalled and examined, the cross-examination is limited to the matter on which he has been re-examined. In the discipline of this court the trial judge is vested with a sound discretion to stop the prolonged and unnecessary examination of a witness, and when there has been no injustice done the defendant, this court will not interfere with this discretion.

State vs. Southern et al., p. 628.

